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EDACTED VERSION

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1999

BRUCE LYNN SONS,
*Petitioner,*

*vs.*

THE STATE OF CALIFORNIA,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIFTH APPELLATE DISTRICT

## PETITION FOR WRIT OF CERTIORARI

ROBERT A. SACKS
*Counsel of Record*
*for Petitioner*

**SULLIVAN & CROMWELL**

1888 Century Park East
Los Angeles, California 90067
(310) 712-6600

MICHAEL H. STEINBERG
ROBERT J. GIUFFRA, JR.
DANIEL E. SOBELSOHN

*Of Counsel*

26788

## QUESTION PRESENTED

There is a conflict among the federal courts of appeal and the state courts over the following constitutional issue:

> Whether a State's withholding of exculpatory evidence from a criminal defendant in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), can be excused on the ground that the criminal defendant, had he exercised "due diligence," might have been able to obtain some (but not necessarily all) of the suppressed exculpatory evidence through other means.

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Petitioner Bruce Lynn Sons[1] ("Petitioner" or "Sons") respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Fifth Appellate District, affirming Petitioner's conviction for first degree murder with special circumstances.

## OPINION AND ORDER BELOW

The decision of the Court of Appeal of the State of California for the Fifth Appellate District, dated March 3, 1999, is unpublished and is reprinted as Appendix A. The order of the California Supreme Court denying review of the decision affirming Petitioner's conviction, entered on June 16, 1999, is also unpublished and is reprinted at Appendix B.

## JURISDICTION

The order of the Supreme Court of the State of California denying review of the decision affirming Petitioner's conviction was entered on June 16, 1999. This Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

U.S. CONST. amend. V.

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[1] All of the parties to this proceeding are listed in the caption of the case.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

## STATEMENT OF THE CASE

This Petition presents an important issue regarding an expansive exception to the constitutional rule announced by this Court nearly four decades ago in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The due diligence exception adopted by the state court below is at odds with decisions in two federal courts of appeal (the D.C. and Tenth Circuits) that have declined to find any due diligence exception to *Brady.* Even the decisions of the federal courts of appeal and state courts recognizing a due diligence exception of some sort are in conflict with one another in defining the scope of such an exception.

This fundamental issue of federal constitutional law has never been addressed by this Court. The issue was presented to this Court last term in the petition for certiorari in *Strickler* v. *Greene*, and in this Court's order granting certiorari in that case, *see* 119 S.Ct. 40 (1998), but this Court disposed of that case on other grounds without reaching this issue. *See Strickler*, 119 S.Ct. 1936 (1999).[2]

The issue of whether there is a due diligence exception to *Brady* is dispositive of and clearly presented in this case without any procedural default. It is unchallenged in the record below that the State had in its possession and consciously withheld from Petitioner material exculpatory evidence, and that Petitioner did not in fact have access to that evidence at the time of his criminal trial. The decision of the state court below is founded not only on the existence of a "due diligence" exception to *Brady*, but on the existence of an exception so broad as to countenance conscious *Brady* violations involving non-public information that could only be uncovered, if at all, through substantial, private investigatory efforts on behalf of the criminal defendant. In this case, the court below even excepted from the strictures of *Brady* the suppression of exculpatory evidence of official disciplinary action contained in confidential government records that were not available to (and therefore could not have been obtained by) the defense through its own investigation.

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[2] The question presented in the petition for certiorari in *Strickler* v. *Greene* was whether a due diligence exception to *Brady* exists and, if so, whether it is limited to information readily available to the defense in a public forum. This Court granted the petition on three questions, one of which was whether *Brady* had been violated and another of which was whether the petitioner had been prejudiced by the non-disclosure. 119 S.Ct. 40. This Court resolved *Strickler* on the ground that the information withheld from the petitioner was not material, *see* 119 S.Ct. at 1955, and therefore did not reach the issue clearly presented by this case.

## A. Background.

At approximately 9:00 a.m. on July 11, 1994, Petitioner and a uniformed officer of the California Highway Patrol ("CHP"), Richard Allen Maxwell ("Maxwell"), were involved in a shooting incident that arose from what appeared to be a routine traffic stop and which resulted in Maxwell's death. The State charged Sons with first degree murder with special circumstances, even though the prosecution conceded at trial that Maxwell shot first, and shot at Sons at least three times before *anyone* returned fire. After the jury originally deadlocked (A213[3/]), Petitioner was found guilty of first degree murder with special circumstances. (A3.)

Sons appealed to the California Court of Appeal, which affirmed the conviction. Sons thereafter sought review from the California Supreme Court, which denied his Petition for Review. (B1.) One Justice (Kennard, J.) voted to grant Sons' Petition for Review. (*Id.*)

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[3/] The Opinion of the California Court of Appeal is reprinted as Appendix A and cites thereto are abbreviated "A[page]"; the order of the California Supreme Court is reprinted as Appendix B, and cites thereto are abbreviated "B[page]"; Annex A is reprinted as Appendix C and cites thereto are abbreviated "C[page]"; excerpts from the Reporter's Transcript of Testimony and Proceedings are reprinted as Appendix D, and cites thereto are abbreviated "D[page]".

## B. The State's Suppression of the Exculpatory Personnel Files and "Annex A".

In this trial for first degree murder, the question of who started and escalated the altercation was *the* critical issue for the jury. At trial, the State portrayed Sons as a cop-hater, who, when stopped by Maxwell, escalated the traffic stop into a violent confrontation in which Sons premeditated in the moment before firing the fatal shot. Sons' defense, by contrast, was that Maxwell was the aggressor and had dramatically escalated tensions at the scene by using improper physical force and by threatening to shoot Sons and his minor step-son, Jeremy, who was in the car with Sons at the time of the stop.[4]

To bolster its case, the State presented Maxwell as a model police officer, with an unblemished record. However, in direct contrast to that presentation at trial, the CHP had in its personnel and investigative files extensive documentation of Maxwell's tarnished record of service. The State concealed those files from Petitioner, who did not become aware of their contents until his appeal.[5]

As part of its investigation of Maxwell's death, the CHP had prepared a "Shooting Incident Report," which had as its “Annex A”[REDACTED ]. (C1-6.) Contrary to the State’s evidence at Petitioner’s trial, Annex A discloses that [REDACTED ]. According to the concealed evidence, [REDACTED ]. (C5 (emphasis added).) Annex A also revealed that [REDACTED ] (C2, C4), and [REDACTED ]. (C3.) [REDACTED ]. (C4.)[6/]

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[4] Jeremy Sons testified that Maxwell said to him, "I'm not fightin' both of you, I would just a[s] soon shoot you." (A55.)

[5] Appellate counsel to Sons received Annex A as part of a request to augment the record on appeal. After Sons received Annex A (and its exculpatory materials), the State unsuccessfully sought to require Sons to return these materials.

## C. The State’s Suppression of the Exculpatory Evidence Was Outcome Determinative.

### 1. The Prosecution’s False Closing Argument to the Jury.

Notwithstanding Maxwell’s extensive, but undisclosed, [REDACTED ], the State portrayed

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[6/] In addition, Annex A revealed that [REDACTED ], a concealed fact that tended to contradict the State’s assertion that this was a routine traffic stop. (C6.)

Maxwell to the jury as a model officer. In closing argument, the prosecutor argued that Sons' defense — that Maxwell escalated the situation — was factually unsupported:

> Was there any evidence whatsoever that Officer Maxwell had any type of character flaw or lapse of judgment in his professional career, because obviously we could have heard about that if there were.
>
> *And I can answer that. There was not. None whatsoever. And an officer doesn't suddenly one day in 1994 after being a Highway Patrol officer for five years suddenly lapse into unreasonableness*

(A101 (emphasis added).) The State was able to make this flatly false assertion only because it had successfully suppressed the exculpatory materials in its own files that contradicted it.

The State's successful suppression of this evidence followed no fewer than five separate requests by Sons' defense counsel for these types of materials. (A63-76.) Nonetheless, the trial court refused to order the disclosure of Annex A or Maxwell's personnel records, and instead only required the disclosure of the names, and last known addresses and telephone numbers, of the complaining and percipient witnesses in six complaints filed against Maxwell **[REDACTED**

].[7] (A67-68.)

### 2. The Impeachable Testimony from the CHP's Expert Witnesses.

Not only would disclosure of Annex A have prevented the State from misrepresenting Maxwell's record to the jury, but its disclosure would have provided a basis for devastating impeachment of two CHP officers, who were permitted to testify as expert witnesses for the State. CHP Sergeant James Young opined that Maxwell had acted appropriately and had not improperly escalated the situation, and CHP Lieutenant Fincel testified that Maxwell had acted properly based in part on Maxwell's training and experience. (D3-4, A41.) Neither of these two State experts was present at the shooting, and the opinions to which they testified were fundamentally inconsistent with Maxwell's **[REDACTED** ] and his history of **[REDACTED** ], a history summarized in Annex A to the Shooting Incident Report to which both Young and Fincel had access.

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[7] Indeed, the trial court had given Sons every indication that these materials were not helpful to Sons' defense. After conducting an *in camera* review of materials that included Annex A, the Court informed Sons:

> I don't know, first of all, that it would actually be relevant, that it would actually be admissible, so I don't even know that you would get your things that would be helpful to you in there, but if you did, believe, me, you would not want to see the rest of it. It would not be of any benefit to Mr. Sons whatsoever. . . .

(D1-2.) The trial court went on state that the portions of the Shooting Incident Report that it refused to order be disclosed were not worth any further effort by defense counsel:

> And believe me, overall, I feel comfortable suggesting that if you are short on time, [ ] you may want to think twice before you spend a lot of time going up on that particular issue on writ. [¶] Okay. I probably said more than I should. . .

(*Id.*)

## D. The Court of Appeal's Decision.

Although this suppressed information was undeniably material and exculpatory, was undeniably in the possession of the State, and was undeniably withheld from Petitioner, the Court of Appeal held that there was no *Brady* violation, and affirmed Petitioner's first degree murder conviction. The Court of Appeal reasoned that because the defense could, in theory, have taken steps to reconstruct some (but not all) of the exculpatory information in Annex A through interviews of persons who had filed complaints against Maxwell, there was no *Brady* violation from the suppression of Annex A or the personnel files themselves. (A109-110.)

To reach its conclusion, the state court below simply presumed that (i) Petitioner's trial counsel had the available resources to track down this "lead", notwithstanding whether the defense team in fact had the resources (and time) to do so, (ii) each of the individual complainants was traceable from the limited information (*i.e.*, last known addresses and telephone numbers) provided to Petitioner, (iii) if found, these persons would have cooperated with a defense investigation in this well-publicized case, (iv) each of the individuals had retained both his or her complaint against Maxwell, and the results of any CHP inquiry (to the extent that any such correspondence was provided to the complainant),[8] (v) each individual's recollection of his or her altercation with Maxwell was unlikely to be impeached by either lapse of memory or by his or her own possibly criminal background, and (vi) evidence of the results of the CHP inquiry and the disciplinary action taken would be admitted at trial through the testimony of the complainants, despite any hearsay or other evidentiary issues. The court below also made no inquiry to determine what efforts Petitioner's defense team had in fact made to uncover any of this evidence independent of the five separate requests made for these records during the course of Petitioner's criminal trial, nor did the court address the fact that these official records were not publicly available.

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[8] Although Petitioner still does not have access to these materials, the Court of Appeal, which does, noted that one complaint was evaluated without any written record being provided to the complainant. (A86.)

## REASONS FOR GRANTING THE WRIT

### I.

### THE CIRCUIT COURTS OF APPEAL ARE DIVIDED OVER THE EXISTENCE OF A DUE DILIGENCE EXCEPTION TO *BRADY*.

The Circuit Courts of Appeal have all now addressed, with varying and inconsistent results, the precise issue raised here — whether the failure of the State to comply with its disclosure obligations under *Brady* may be excused where the defense might have found some or all of the concealed information through its own investigation. No decision of this Court has ever adopted such an "exception" to the rule announced in *Brady*.

Just last term this Court reaffirmed that to comply with the disclosure requirements of *Brady*, "'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf . . . , including the police.'" *Strickler* v. *Greene*, 119 S. Ct. at 1948 (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995)). Due process is violated when the suppressed "evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985).

Consistent with this Court's decisions, the D.C. Circuit has for more than thirty years held that the duty established by *Brady* is affirmative and requires a prosecutor to disclose exculpatory evidence possessed by the prosecution team, regardless of whether a defendant might find the exculpatory evidence if provided some "lead." *See United States* v. *Agurs*, 510 F.2d 1249, 1253 (D.C. Cir. 1975), *rev'd on other grounds*, 427 U.S. 971 (1976); *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966) ("appellant's claim for relief based upon a breach of the prosecutor's duty challenges the fairness, and therefore the validity, of the proceedings, and relief . . . may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own"). The Tenth Circuit has also declined to excuse a State's failure to comply with its constitutional duties through such an exception. *See Banks* v. *Reynolds*, 54 F.3d 1508, 1518 (10th Cir. 1995) (refusing to adopt exception to the prosecutor's duty to produce information "which the defense knows or reasonably should know about").

At the opposite end of the spectrum, the Fourth and Sixth Circuits have recognized an onerous due diligence exception, similar to that adopted here by the California Court of Appeal. In *Hoke* v. *Netherland*, 92 F.3d 1350 (4th Cir.), *cert. denied*, 519 U.S. 1048 (1996), the Fourth Circuit held that the suppression of certain witness statements made to police by the past sexual partners of a rape and murder victim did not constitute a *Brady* violation because the defense attorney, through reasonable diligence, somehow should have been able to duplicate the police investigation, locate these witnesses, and elicit the same responses they provided to the police. *See Hoke*, 92 F.3d at 1355-56; *see also United States* v. *Todd*, 920 F.2d 399, 405 (6th Cir. 1990) (witness interviews conducted near the time of the crime need not be disclosed because defendant had opportunity to interview same witnesses a year later).

The remaining Circuits have adopted due diligence exceptions to *Brady*, but without specifically defining what constitutes "due diligence." *See, e.g., Lugo* v. *Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982) (finding due diligence exception where undisclosed materials "were a matter of public record"); *United States* v. *Zackson*, 6 F.3d 911, 918 (2d Cir. 1993) (no suppression if the defense "'either knew, or should have known of, the essential facts permitting him to take advantage of that evidence'"); *United States* v. *Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991) ("*Brady* does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence."); *Westley* v. *Johnson*, 83 F.3d 714, 725-26 (5th Cir. 1996) (no *Brady* violation where inconsistent testimony from a witness in another trial was not disclosed because such testimony was available to the defendant), *cert. denied*, 519 U.S. 1094 (1997); *United States* v. *Dimas*, 3 F.3d 1015, 1018-19 (7th Cir. 1993) (no suppression where "defendants might have obtained the evidence themselves with reasonable diligence"); *United States* v. *Davis*, 785 F.2d 610, 618 (8th Cir. 1986) (defense counsel had information in its possession and the resources of the state were not needed to determine its meaning); *United States* v. *Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (when "a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government"); *Wright* v. *Hopper*, 169 F.3d 695, 701 (11th Cir. 1999) (to establish a *Brady* violation, a defendant must affirmatively demonstrate "that [he] does not possess the evidence nor could he obtain

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it himself with any reasonable diligence"), *petition for cert. filed*, No. 99-5354 (Jul. 20, 1999).[9/]

Thus, even among the Courts of Appeal finding a due diligence exception, there is inconsistency as to the type of records that may be subject to discovery by the exercise of "due diligence." For example, while "matter[s] of public record" are deemed to be subject to discovery by the defense within the First Circuit, *Lugo*, 682 F.2d at 9, in the Fifth and Seventh Circuits, records of criminal convictions (which are, themselves, "matters of public record") are apparently *not* deemed to be subject to discovery upon exercise of due diligence. *See Crivens* v. *Roth*, 172 F.3d 991, 996-97 (7th Cir. 1999); *Perdomo*, 929 F.2d at 973 (noting that "the prosecution, not the defense, is equipped with the resources to accurately and comprehensively verify a witness' criminal background"). In further contrast to the Fifth and Seventh Circuits' approach, the Ninth Circuit has held that a prisoner's Department of Corrections file, which is a public record, need not be provided by the prosecution, even though it clearly is

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[9/] Many state courts have also engrafted a due diligence exception onto the disclosure requirements mandated by *Brady*. *See, e.g.*, *Conner* v. *Indiana*, 711 N.E. 2d 1238, 1246 (Ind. 1999) ("reasonable diligence"); *Ragsdale* v. *Florida*, 720 So.2d 203, 207 (Fla. 1998) (due diligence); *Freeman* v. *Alabama*, 722 So.2d 806, 811 (Ala. Crim. App. 1998) (knew or should of known of facts that would allow defendant to take advantage of undisclosed evidence); *Connecticut* v. *Shannon*, 563 A.2d 646, 654 (Conn.) (reasonable diligence or equally available), *cert. denied*, 493 U.S. 980 (1989); *Anderson* v. *Leeke*, 248 S.E. 2d 120, 122 (S.C. 1978) (*Brady* duty of disclosure only arises when evidence is unavailable to defendant).

possessed by part of the prosecution team. *See Aichele*, 941 F.2d at 764.

## II.

## THE EXISTENCE AND SCOPE OF A "DUE DILIGENCE" EXCEPTION TO A STATE'S DUTY UNDER *BRADY* PRESENTS A SIGNIFICANT CONSTITUTIONAL ISSUE.

The decision of the California Court of Appeal recognizing a due diligence exception to a violation of *Brady* presents an extreme misapprehension of a prosecutor's duty of disclosure under this Court's settled precedent. In *Brady* this Court noted that,

> [a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. . .

373 U.S. at 87. Since *Brady*, this Court has made clear that the duty of disclosure applies regardless of whether the defendant has a made a request for the exculpatory material, and that the duty extends to both impeachment evidence as well as exculpatory evidence. *See Strickler*, 119 S.Ct. at 1948; *United States* v. *Agurs*, 427 U.S. 97, 107 (1976); *Bagley*, 473 U.S. at 676. In addition, the duty of disclosure applies even to evidence known only to police investigators

and not to the prosecution. *See Kyles* v. *Whitley*, 514 U.S. 419, 433-34 (1995).

Never before has this Court suggested that the existence of a State's *Brady* obligation depends upon the subjective determination of whether the defendant might be able to find the exculpatory material on his own. Given the obligation to provide information without a request, a due diligence exception is at odds with this Court's precedent. Further, as the D.C. Circuit recognized, such an exception in inappropriate since "[a] criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner.'" *Levin*, 363 F.2d at 291.

Permitting courts to graft an exception to the prosecution's duty upon these clear and unambiguous rules will undermine the effectiveness of the *Brady* rule and result in the gradual evisceration of *Brady* protections altogether. Nowhere is that illustrated more clearly than in this case where is was undisputed that the Petitioner did not in fact have access to the suppressed information and requested it from the State (A63-76); where the actual records were non-public government records that could not have been obtained by Petitioner through independent investigation (*id*); where the only way Petitioner could have gained access to the underlying information would have been through an extensive investigation at significant cost that may or may not have revealed some of the information contained in the records the State withheld from him; where the records were readily available to the State, were in fact made available to some of the prosecution's trial witnesses, and could have been turned over to Petitioner with minimal effort (D3-4); where the information suppressed was undeniably material; and where Petitioner's inability to access the exculpatory information permitted the State to make arguments to the jury that were false. (A101.)

A rule that permits the existence of a constitutional violation to depend upon a court's after-the-fact subjective determination of whether the defendant could have obtained the suppressed information provides an incentive for prosecutors to withhold from criminal defendants the information that by its very nature would be most helpful to the defendant and harmful to the State's case. Indeed, the exception recognized by the state court below would set up a framework for selective disclosure of exculpatory material; *i.e.*, where the prosecutor would first determine whether he felt the defendant might be able to find the exculpatory information in the State's possession and then, on the basis of that determination, turn over only information that he concluded the defendant could not find himself were he to look for it. Thus, rather than applying to *all* exculpatory material, *Brady* will be relegated to the limited class of exculpatory material that no one could reasonably conclude could be uncovered by a criminal defendant through his own investigation. In the case of a prosecutor faced (like here) with highly exculpatory material, the disclosure of which might compromise the strength of the State's case, such a rule further encourages the suppression of evidence on the hope that it will never be uncovered, especially if the prosecutor perceives that the possibility of independent discovery, through theoretically possible, is highly unlikely.

The problem with such an exception is also reflected in the inconsistent scope of the exception applied in those

Circuits that have recognized one. The Courts of Appeal have yet to articulate a consistent standard as to the level of independent investigation to which a criminal defendant is to be held before he loses the protections of *Brady* for material exculpatory information that was concealed from him and that he did not find out about. For example, to the extent the exception is limited, as in some courts, to information that is publicly available, it would not apply in a case like this. Here, Petitioner had no ability to access the personnel files and investigatory reports that contained the exculpatory information withheld from him (his counsel made at least five unsuccessful requests for them), and the evidence he could theoretically have obtained by independent investigation, even if he had found it, was of a different character and quality than the evidence contained in the State's official records.

However, once one gets beyond publicly available information, the ability to apply an objective standard to any *Brady* exception disappears. Does "due diligence" depend upon the resources of the particular defendant, the effectiveness of his investigator, or the number of hours spent trying to hunt down information? If a defendant tries hard but does not find the suppressed information is he out of luck? Is expert testimony needed to establish a standard of reasonable diligence? Each time it is revealed that material information was suppressed, is the court required to hold an evidentiary hearing (which was not done by the court below in this case) to determine what investigatory efforts were made by the defendant and to decide whether those unsuccessful efforts were reasonable? The result will almost by definition be a multitude of fact specific inquiries that are the antithesis of the bright-line standard set out by this Court in *Brady*. The goal of determining the truth and administering justice are best served by the simple rule established thirty-six years ago in *Brady* – that material exculpatory evidence must be disclosed.

Finally, even if there exists a due diligence exception to the disclosure obligations set forth in *Brady*, it could not reasonably apply to a situation, like here, where the trial court undertook an *in camera* review of the exculpatory evidence and falsely informed Petitioner's defense counsel that there was nothing helpful to the defense. *Cf. Strickler*, 119 S.Ct. at 1949 (no procedural default in raising *Brady* issue because defense reasonably relied upon the prosecution's "open file" policy).

Because this Court has not addressed before this "exception" to the clear duty articulated in *Brady*, certiorari should be granted to determine whether this Court's affirmative articulation of that duty has been undermined. Without review and guidance in this area, this Court will be faced with the prospect that convictions will be obtained, like here, on the basis of palpably false representations to the jury, a result that undermines all confidence in the verdict and our system of justice — confidence that the disclosure requirements of *Brady* are designed to foster.

## CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the California Court of Appeals for the Fifth Appellate District.

Respectfully submitted,

Robert A. Sacks
*Counsel of Record for Petitioner*

Michael H. Steinberg
Robert J. Giuffra, Jr.
Daniel E. Sobelsohn
*Of Counsel*

SULLIVAN & CROMWELL
1888 Century Park East
Los Angeles, California 90067

# APPENDIX A

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

**FILED**
Court of Appeal
Fifth Appellate District
MAR 03 1999
Eve Sproule Court Administrator/Clerk
By________________
Deputy

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>BRUCE LYNN SONS,<br>Defendant and Appellant. | F023776<br>(Super. Ct. No. 59195A)<br>**OPINION** |

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Clarence Westra, Lenard M. McGillivray and James M. Stuart, Judges.*

Sullivan & Cromwell, Robert A. Sacks and Michael H. Steinberg, for Defendant and Appellant.

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Stan Cross, Supervising Deputy Attorney General, Michael A. Canzoneri and Janis Shank McLean, Deputy Attorneys General, for Plaintiff and Respondent.

**-oo0oo-**

On August 10, 1994, the Kern County Grand Jury returned a seven-count indictment against appellant Bruce Lynn Sons, charging him in count 1 with premeditated murder involving the personal use of a firearm (Pen. Code §§ 187, subd. (a); 12022.5, subd. (a)) and with the special circumstance that the victim was a peace officer engaged in the performance of his duties (Pen. Code, §§ 190, subd. (b); 190.2, subd. (a)(7)); in counts 2 through 6 with possessing stolen property (Pen. Code, § 496, subd. (a)); and in count 7 with operating a "chop shop" (Veh. Code, § 10801).

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* Judge Gary T. Friedman, Judge Clarence Westra and Judge Lenard M. McGillivray heard various pretrial motions. Judge James M. Stuart presided at trial.

Appellant pled not guilty and denied the special allegations. The prosecution sought the death penalty.

Following numerous pretrial motions, the guilt phase of appellant's jury trial began on December 12, 1994. During jury selection, two of the stolen property counts were dismissed upon the prosecutor's motion. Deliberations began on February 24, 1995; on March 3, appellant was convicted of first degree murder. The special circumstance and firearm use allegations were found to be true. He was also convicted of one count of receiving stolen property (a Chevrolet truck), but was acquitted of the remaining charges.

Following denial of his motion for new trial, and in accordance with the jury's penalty verdict, appellant was sentenced to a total term of life in prison without the possibility of parole plus four years for the firearm use enhancement, and ordered to pay a restitution fine. This timely appeal followed.

## FACTS[1]

### I. Prosecution Evidence

On March 18, 1991, a 1979 Chevrolet three-quarter ton pickup was taken from the Rio Bravo Resort. The vehicle was subsequently found cut in half.

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[1] Since no issues concerning the penalty phase of trial are raised on appeal, we recite only evidence adduced at the guilt phase.

On March 28, 1992, a 1989 three-quarter ton Chevrolet Silverado pickup truck, flatbed trailer, and landscaping tools belonging to Carla and Mark Clendenen were taken from the Clendenens' work site approximately one to one and one-half miles from appellant's residence.

On June 4, 1992, appellant had George Reagan tow a Ford Mustang from a convenience store at Manor and Chester Lane in Oildale to appellant's residence at Snow and Allen Roads. At some point, appellant showed Reagan a pink slip for a Mustang. That same day, Deputy Williams took a theft report from Steven Hill concerning a 1965 Ford Mustang which had been taken from the lot of the market at Manor and North Chester. Williams obtained information that witnesses had seen a two truck in the vicinity of the vehicle. Deputy Comstock subsequently contacted Reagan, who said he had loaned his tow truck to "Brian" Sons, and that he did not know where Sons lived.

During 1991, Erik Howard lived with appellant and Lynda Sons, his aunt and uncle, at their residence on Snow and Allen Roads. One of the buildings at that location was used by appellant as his shop. While there, Howard took cars apart, at appellant's direction, in order to sell the parts. Appellant was in the business of fixing automobiles, and he was trying to teach Howard how to be a mechanic so that Howard would have a trade.

At some point prior to July 29, 1992, Erik Howard saw appellant and Jeremy (appellant's teenage stepson) bring the Clendenen vehicle and trailer to appellant's shop.[2] There were gardening tools in the trailer. Appellant said it was taken in the new tract of houses off Rosedale Highway, although he did not say that he took it. Howard dismantled the vehicle. Also prior to July 29, 1992, Howard saw the Rio Bravo truck. Appellant said he himself dismantled it, and that he drove it off of the golf course on Stockdale Highway. During this same time frame, Howard saw the Hill Mustang in the shop. The vehicle was there because someone named Steve owed appellant some money for drugs and for working on his cars, and signed over the pink slip to him. Appellant picked up the car because the person never repaid the money. Howard actually saw Steve sign over the pink slip.

In April of 1993, Cameron Keese (who admitted lying to the grand jury about this incident) owned a yellow Corvette. That month, Keese falsely reported to the sheriff's department that the vehicle had been stolen from the Bakersfield Speedway. In fact, Keese had arranged for appellant to take the car so that Keese could collect the insurance. Keese ultimately received a little more than $11,000 from his insurance company. At some point, Howard saw this vehicle at appellant's shop. Appellant said it was given to him by a partner of his, Mack McCutchen.

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[2] Howard was incarcerated in the county jail from July 29, 1992, through February 1993, for felony receiving stolen property. This consisted of approximately $85,000 in cash that Jeremy brought to him and that was stolen from appellant. He was imprisoned in state prison from May 3, 1994, to September 6, 1994, for violation of felony probation, based on his failure to report to the probation officer and failing a drug test.

Between February 1993 and May 1994, Erik Howard was at appellant's shop about two or three times every other week, helping appellant by dismantling vehicles for parts. Appellant paid Howard for his work with methamphetamine and money.[3] Although Howard never leased part of the shop from appellant, after appellant's arrest, appellant asked Howard to say that he leased the west bay of the shop.

California Highway Patrol (CHP) Officer Lacey, who had extensive instruction, training, and experience in the area of vehicle theft, defined a "chop shop" as a place to which a stolen vehicle is taken for dismantling and removal of parts. Serial numbers on the parts are changed or destroyed. Unidentifiable parts are placed into other vehicles or sold.

On June 11, 1994, Lacey responded to appellant's residence at Snow and Allen Roads. Pursuant to a search warrant, he searched the shop at the rear of the property. Based on what he saw, including the Clendenen truck, Hill Mustang, Keese Corvette, and Rio Bravo truck, he concluded that a chop shop was being operated there. There were several barrels containing car parts outside the west end of the shop. Also out there was a large burn barrel which contained license plates that had been cut up into very small pieces. In addition, searching officers found tools and an engine that had had the serial numbers removed. The vehicles recovered from the property were impounded.

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[3] According to Howard, Jeremy also obtained amphetamine from appellant.

On the evening of July 9, 1994, Lacey returned to the premises to look at another vehicle, a white mid-1960s Chevrolet El Camino, license number T38959. It was suspected that the vehicle was stolen, as the public vehicle identification number did not match what may have been a secondary vehicle identification number; there was a stolen vehicle report that closely matched this particular vehicle; and the victim's keys fit the ignition and gas cap of the car. Lacey recommended that sheriff's deputies impound the car for further investigation, and the vehicle was towed early on the morning of July 10.[4]

On the night of July 10, appellant and Jeremy stayed at James Sons's property at Snow and Allen Roads.[5] Jeremy went hunting the next morning. Appellant watched him. Jeremy used a Winchester shotgun. Appellant, who owned an Ithaca shotgun, did not hunt on this occasion.

As of July 11, 1994, the district attorney's office had not yet acted upon law enforcement's request for a complaint against appellant for operation of a chop shop and possession of stolen vehicles.[6] At approximately 8:15 that morning, Deputy Williams, an auto theft detective who had participated in the June 11 search of appellant's shop, received a telephone call from appellant. Appellant informed Williams that he (appellant) had taken his car back, that the police did not have any reason to take it, and that it belonged to his son.[7] Appellant then asked when he would receive the vehicles and other property that had been impounded as a result of the June 11 search. Appellant said the items were all his and that he had paperwork for them, so Williams told him to bring it down to the office and Williams would look at it then.[8] From there on, the conversation started "going downhill[.]" Appellant became agitated. Williams kept telling him that he was not going to take a statement, and that appellant would have to bring the paperwork down to the sheriff's office. Appellant continued to raise his voice and became more agitated, and Williams hung up on him.

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[4] The vehicle was not, in fact, stolen. Jeremy had purchased it from Mike Taylor. When appellant was arrested, among the items seized from him was a pink slip for the vehicle, bearing the name of Michael Robert Taylor, Jr., and signed by Taylor on July 5, 1994.

[5] James Sons is appellant's father. He will be referred to as "Sons" or "James Sons."

On July 11, Richard Maxwell, who had been a CHP officer for close to five years, attended a briefing at 5:45 a.m., the beginning of his shift. The briefing consisted of updates on stolen cars and similar information. The officers received no notification, either on July 11 or just prior to that, that a white Chevrolet El Camino, California license number T38959, was stolen. Maxwell did tell CHP Officer Harvey, who also attended the briefing, about an El Camino that had evaded him at Knudsen and Olive the previous day. Because of the evasion, Maxwell thought the car, which had been driven by a white male, might be stolen.[9] Maxwell told Harvey that he was going to be on the lookout for that vehicle. The night before, Maxwell had mentioned to his wife that a vehicle had evaded him, although he never specified what type. Maxwell said something to the effect that he could not rest until he got it.

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[6] Ironically, the sheriff's department received the complaint that afternoon.

[7] The El Camino was taken, without authorization, from the towing company sometime on the morning of July 10.

[8] Appellant's attorney had informed Williams on June 13 or 14 that he had pink slips on most of the property. Williams invited him to bring appellant to the station, but the meeting never took place.

Maxwell began his street patrol at 6 am. Between 6:15 and 6:30 a.m., he stopped Frank Gonzales for speeding. Maxwell, who merely gave Gonzales a warning, was cordial. At approximately 7 a.m., Maxwell stopped Brian Warnack, also for speeding. Maxwell merely warned Warnack about his speed, but did cite him concerning his seat belt. Maxwell acted normally. At approximately 7:30, Maxwell, who lived five to six blocks from James Sons's residence, stopped at home. He was not home very long before he received a call to leave. His wife observed him to be in the same mood he was always in—very quiet and mellow. At approximately 8 a.m., Maxwell responded to a call placed by Edith Williams. He was very cordial and professional.

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[9] During the post-shooting investigation, no indication was found that, on July 11, Maxwell ran the license number of the white El Camino involved in this incident.

At 9:05:18 a.m., Maxwell radioed the CHP dispatcher that he had an El Camino "not yielding at Cedarcrest."[10] At 9:05:29, Maxwell asked the dispatcher to start another unit to Mignonette and Cedarcrest. The dispatcher clarified Maxwell's location; at 9:06:01, CHP Officer Taggart, who was approximately four miles away, radioed that he was responding. At 9:06:51, Maxwell requested that the unit be expedited. At 9:07:25, he radioed, "148 times two." This meant he had two individuals resisting, delaying, or obstructing an officer in the performance of his duties. This was followed by radio traffic in which officers were in contact with the dispatcher, trying to learn the location of the incident.

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[10] Because of witnesses' differing vantage points and perceptions, it is virtually impossible to place events just prior to the shooting in chronological order. Accordingly, we give an overview, based on CHP records and witnesses, followed by other witness accounts.

James Sons resided at 6816 Cedarcrest Avenue, where the shooting occurred. The house had a driveway leading to a garage and carport. In the carport were a boat and trailer. In the carport were a boat and trailer. In the garage were a washer and dryer, and a green Jaguar with the hood tilted forward. This car belonged to appellant, who had been working on the motor. The exterior walls of the house, including the wall between the garage and carport, had brick fascia covering the lower portion. Attached to the rear of the house was covered patio. There was a large shed in the back. Prior to appellant's arrival in the white El Camino, a gray Ford Pickup and a blue Dodge pickup were in the driveway.

At 9:10:02, Taggart radioed that he had arrived at Maxwell's location. He could see Maxwell's vehicle in the driveway, but could not see Maxwell. As he was preparing to park, he heard a large blast. When he pulled over and saw Maxwell, he knew it had been a shotgun. Maxwell was in a seated position, leaning against the tongue of a boat trailer. His left arm was on the concrete, loose; his head was back and cocked to the right, and he was firing his weapon. The elbow of his firing arm was not in a locked position and there was blood on the back of his shirt. Maxwell was using the departmental issue .40 caliber Smith and Wesson semi-automatic handgun, which held 12 rounds. Taggart saw him fire two to three times toward the front door area of the house. Taggart could not see anyone else at that point.

At 9:10:10, Taggart radioed that shots had been fired. After the dispatcher instructed all units to roll, Taggart requested an ambulance, as an officer was "down." Taggart did not immediately go to Maxwell's assistance, as James Sons appeared between the blue truck and the white one. Taggart ordered him to the ground. At 9:11:01, Taggart radioed that he had one suspect down on the ground, but did not know what was in the house. He again requested an ambulance and tried to give directions to the many other units who were on the air. During this time, he attempted to keep watch on the house as best he could. However, at some point, Sons, who seemed dazed, went back inside the house.

Around 9 a.m. on July 11, Jennifer Wolan and Emily Meyer were just leaving Meyer's residence at 6813 Mignonette when a CHP vehicle passed them, going south on Mignonette. They decided to follow. As the CHP car approached an alleyway that runs onto Mignonette Street between Cedarcrest and Norris Road, a white vehicle pulled out of the alley. The CHP car made an abrupt stop because the other vehicle pulled in front of it, then made a U-turn.

Wolan and Meyer continued to follow. On Cedarcrest, Meyer saw the CHP car and the other vehicle in a driveway. The CHP officer was out of his car, and the other man was also out of his car and was leaning over the hood of the CHP vehicle. His hands were behind his back and the officer was behind him. The officer appeared to have hold of the man's hands, although Meyer did not see any handcuffs or weapons. As she and Wolan slowly drove by, Meyer saw the man pull away from the officer and the officer back off a step. The man's hands were free; he turned his body toward the officer and started yelling at the other man. Meyer heard the man ask, "What do you want." She did not hear the officer say anything. The last Meyer saw, the men were on the driver's side of the patrol car and were face-to-face. The officer was still backing up.

Chris Brazeau, who was 17 years old at the time of trial, lived at 6725 Mignonette. He had attended school with Jeremy. Between 9 and 9:15 on the morning of July 11, Brazeau (who had used a small amount of marijuana that morning) left his house and headed across the street to the residence of Doug and Danny Williams, Denise Kili, and Jennifer Wagley. As he crossed Mignonette, he saw a white El Camino being followed by a squad car. Appellant was driving the El Camino; Jeremy was with him. The squad car was five or six car lengths behind. Both vehicles were going fast, and both pulled into the driveway of James Sons's residence.

After the cars pulled into the driveway, Brazeau could only see the squad car, as his view of the El Camino was blocked by the garage. He saw Maxwell immediately exit his patrol car and walk toward the front of the house. Within a minute, Brazeau saw Maxwell walking back to the police car. Appellant was in front of him. Maxwell shoved appellant over the hood of the patrol car, then tried to place appellant in some sort of arm hold. Maxwell had appellant's right arm behind appellant's back, forcing him up against the fender of the car. Appellant twisted out of the hold; Maxwell grabbed him by one arm and forced him up against the car. Appellant broke free several times.[11] Each time, Maxwell tried to maintain control. Brazeau did not see Jeremy during this time. At some point, Brazeau heard appellant yelling at Maxwell to leave and get out of his driveway. Maxwell "was pretty much quiet the whole time."

Maxwell sprayed mace at appellant two or three times from a distance of three to five feet. Appellant took a step or two back and used his hand and shirt to try to wipe the substance out of his eyes. Jeremy then walked into Brazeau's sight. He walked between the blue truck and the front of the garage, then Maxwell tried to mace him. Jeremy jumped back, then quickly walked up and tried to swat the mace out of Maxwell's hand. Appellant and Jeremy then walked toward the front of the house, and Maxwell followed. Everyone was then out of Brazeau's sight. At no time did Brazeau see a weapon in Jeremy's or appellant's hands.

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[11] On a few occasions, Brazeau went into Danny Williams's house to wake up his friends. It was possible he went back and forth to the Williams house during the struggle between appellant and Maxwell.

Brazeau returned to the other house and managed to awaken Denise Kili. When he came back outside, he did not see anyone. He then heard gunshots—he thought a shotgun two or three times first, then a pistol. He did not see anything until the second officer, Taggart, arrived.

At the time of this incident, Denise Kili lived at 6909 Cedarcrest, at the corner of Cedarcrest and Mignonette. Around 9 a.m. on July 11, Brazeau awakened her to see what was going on outside.[12] They walked outside, where she saw an argument between appellant and an officer. The argument was occurring across the street and a couple of houses down. Appellant and Jeremy were standing in front of the patrol car, Maxwell was standing by the driver's door, and they were arguing. Kili could hear appellant yelling at Maxwell to get off his property, that Maxwell had no business there, and to just leave. Appellant was using profanity and kept repeating the same phrases over and over. Kili did not hear Jeremy say anything; he was walking back and forth in front of the patrol car. Appellant was walking around, waving his hands and screaming at the officer. They were about seven feet apart. Maxwell was speaking to appellant in a calm voice. It was hard for Kili to understand what he was saying because appellant was yelling so loudly. At this point, Kili did not hear Maxwell raise his voice.

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[12] Kili, who had been drinking the night before, had not had any marijuana or anything to drink that morning and was not feeling the effects of the alcohol.

This went on for one or two minutes, then appellant and Maxwell started arguing even more, and Maxwell announced that he was going to call for assistance. He went around his car door and was reaching for something inside the car when appellant started pushing him into the car and trying to shut the door. Maxwell was standing up and pushing the car door open. There was resistance on the car door from appellant, then Maxwell got around the door and started wrestling with appellant, trying to get control of him. Appellant was pushing the officer away. There was physical contact for approximately 30 seconds, with appellant continuing to yell the same things over and over. Kili could not hear Maxwell say anything. Kili did not see appellant leaning over the car with Maxwell having a hand lock on him, although at some point during the struggle, Maxwell had a baton. Kili did not see it ever come into contact with appellant. Maxwell was trying to grab appellant and gain control over him. Appellant then backed up and wiped his eyes with his T-shirt.

Kili went into the house in an attempt to awaken Kip Scrivner. When she returned 15 to 30 seconds later, the yelling was a lot louder. Maxwell ran toward the house after appellant, then got back behind his car door. When appellant turned back toward the house again, Maxwell went after him. This happened two or three times. Maxwell would move toward the front of the house from the position of his open car door, and Kili would lose sight of him. Then he would jog back and get behind the open driver's side door, at which point appellant would advance into Kili's sight. Appellant would not come very close to Maxwell. Kili could not see any weapon in either man's hands during this period, although Maxwell's back was to her. However, this was the first time that she could hear Maxwell. Although she did not recall what Maxwell was saying, he was yelling, using "[a] very stern, serious voice." She could not recall if appellant was yelling anything at this time.

Kili went inside a second time to awaken Scrivner. She had just walked in the house when she heard "[p]robably three to five" gunshots. She, Scrivner, and Brazeau ran outside, at which point she heard a second set of gunshots. Kili could not see Maxwell or appellant. This time, she heard seven to ten gunshots. To her, they sounded quieter than the first set. All told, she heard a total of around 15 gunshots. Although she could not see who was shooting, the sounds came from the direction of the Sons house.

Either as the last gunshots were going off or right after, another officer drove up. He ran toward the driveway, then ran back to his car with his gun drawn and called for backup, yelling that an officer was down. Other police arrived, and Kili directed them to the location down the street. She estimated that she was outside, watching events, for a total of 10 minutes.

Kern County Sheriff's Detective Brown interviewed James Sons shortly after noon on July 11. In the interview, Sons said that during the morning, he went out back to garden, then came inside for breakfast. He was sitting inside, drinking his coffee, when he heard a car pull up in the driveway, then loud voices like people arguing. He went outside and found appellant and a CHP officer arguing. The officer was near the front of the Dodge pickup and the boat. Appellant and Jeremy were near the left front fender of the Jaguar. Sons hollered at appellant a couple of times to knock it off. Appellant and Jeremy (who were on the side of the Jaguar away from the boat) then ran through the garage, and the officer, who was by the tongue of the boat, pulled his gun and started shooting through the garage.[13] Sons did not believe there were shots fired before the officer started firing. Sons believed that appellant and Jeremy ran through the garage to the outside, based on where the officer was shooting. Sons supposed he was shooting at them. They were off to Sons's right; he did not see either of them with a gun. However, there could have been more than one weapon involved in the shooting. Sons is hard of hearing; there could have been a shotgun in all the noise.

Sons's face was injured when he was struck by stucco from the house or shrapnel. His chest tightened up, so he went back inside to take some heart medication. As he closed the door, he saw another CHP officer in the street, with a gun leveled toward the house. When everything grew quiet, Sons walked out the back patio doors. Officers were there with their guns drawn. Sons never saw the first officer down in the driveway. When Sons went inside, the officer was crouched down by the boat tongue, still firing.

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[13] Sons did not actually see the officer pull his gun. It was Sons's impression that the officer did not have his gun drawn at first, but may have drawn it just as Sons came outside.

Sons denied owning the gun scabbard found on the washer and dryer in his garage. He thought it might belong to appellant or Jeremy, as they owned a shotgun. It was possible they brought it with them, since (as far as he knew) they had spent the night out at the ranch. Sons had guns in his house, but no one took any of them. After the shooting, a shotgun was found lying across some chairs on the patio. Sons said he did not know anything about the gun, although appellant and Jeremy generally carried a gun in the El Camino, as they would hunt rabbits.

At trial, Sons testified that he was inside his house, watching television, when he heard a loud argument between two people. When he went out front, he saw Maxwell moving back and forth with his gun drawn. Sons yelled at appellant and Maxwell, "[H]ey, what's going on here, knock it off." Appellant was standing against the garage, near the front of the Jaguar. Maxwell was in the middle of the driveway on the east side of the Dodge pickup, about halfway between the patrol car and the blue Dodge, toward the rear of the El Camino. He was facing the garage. Appellant and Maxwell were facing each other and arguing. Sons did not recall seeing Jeremy.

When Sons first saw appellant, appellant's arms were down at his sides. When Sons hollered at the two men, appellant folded his arms across his body. Both men were arguing loudly. When Sons stepped out of the house, Maxwell had his gun drawn at appellant. Appellant suddenly retreated into the garage, passing along the passenger side of the Jaguar. As soon as he did so, Maxwell started firing. When he started firing, he started walking swiftly between the El Camino and the blue Dodge toward the garage door opening. The first three shots hit the Jaguar. James Sons turned around to go back into the house, and the next two or three shots came at him. The side of the house was hit; Sons's face was bloodied by stucco. Sons did not see Jeremy during the entire incident. Appellant had his arms folded, and Sons did not see any gun in his hands. Sons himself did not have a gun.

After Sons retreated into the house, his chest tightened up, so he took some heart medication. He then called Vincent, another son, to tell him that there was an officer shooting up the house and to come over.[14] Sons sat in his chair for 45 minutes to an hour. He did not go outside. Sons denied being out in the front and having an officer order him to get down to his knees. Sons did not learn that an officer bad been killed until Vincent told him that night.

At trial, Sons acknowledged that there were differences in how he described the incident on the tape, as opposed to in his testimony. He explained that he was in shock, under stress, and very confused when he gave the taped interview. He testified that since he "got everything together," he did not remember seeing Jeremy there at all. He denied making any statements at the CHP office on the day of the shooting that appellant had a bad temper.[15]

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[14] According to Vincent Sons, James Sons told him that a CHP officer was shooting at him and appellant, that he had been hit in the face but did not think it was serious, and for Vincent to get over there as soon as he could and check it out. According to Kern County Sheriff's Detective Soliz, Vincent Sons related that James Sons had telephoned him at his place of business, asked him to come to the house as soon as possible, and said that Jeremy and appellant had fled and that he thought the officer was dead.

Officers Harvey and Vega were the first to arrive on the scene after Taggart. Once they got there, Taggart was able to move Maxwell from the boat trailer to the front yard where, as Maxwell was not breathing, Harvey attempted resuscitation until medical personnel arrived. Maxwell's revolver was left near the tongue of the boat trailer, while his baton was under the blue truck.

Jeremy made his way to the Mathis residence, which was two houses east of James Sons's home. There, he changed clothes and apparently was picked up by a relative. He was arrested around 12:20 that afternoon, approximately four miles from the site of the shooting.

Jeremy subsequently gave a statement to Detective Brown.[16] Jeremy said that when he (Jeremy) approached, Maxwell had appellant across the fender of the patrol car.

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[15] Deputy Simon testified that after the shooting, he transported Sons from the CHP office to headquarters. Sons told him that after the incident, he telephoned Vincent Sons and told Vincent that "Bruce and the officers just had it out." Sons also told Simon that appellant had fought officers before, and that he had talked to appellant about that kind of activity. Sons said appellant had always been uncontrollable and he described appellant as a problem.

[16] Issues concerning admission of this statement are discussed in part V, *post.*

Jeremy wanted Maxwell to stop wrenching appellant's arm, and told the officer to let appellant go. When Jeremy started to walk toward them, appellant broke away and Maxwell kind of pushed appellant away. Maxwell said he was not going to fight them both, but would just shoot them. According to Jeremy, Maxwell "knew he was out of line." Jeremy was going to help appellant when Maxwell sprayed mace in appellant's face and then tried to spray Jeremy.

Jeremy had the Winchester shotgun in the El Camino that morning. That was the only gun that he knew of in the vehicle. It was unloaded. Maxwell saw him take it out of the vehicle through the window, and Jeremy showed him that it was unloaded. Maxwell told him to put down the gun, then came up behind him with a billy club. When Maxwell tried to strike him with the baton, Jeremy blocked the blow with the butt of the shotgun. Maxwell used the baton to try to get the gun out of Jeremy's hand. At some point, Maxwell struck Jeremy's finger with the baton.

Jeremy started out near the front of the El Camino, then walked toward the garage. Maxwell followed, trying to hit him with the baton. When Jeremy turned to block the blow, he was almost facing the officer and his back was to the garage. This was near the left front of the Jaguar, near the northwest corner of the garage area. Maxwell then drew his weapon and Jeremy dropped to the ground. This took place almost at the garage entrance. Jeremy did not know what caused Maxwell to draw his gun. However, as soon as Maxwell pulled the weapon, appellant was behind Jeremy. After that, "there was just confusion[.]"

Meanwhile, immediately following the shooting appellant fled through the back yards of houses in the neighborhood. CHP Officer Mikkelson ultimately took appellant into custody at gun point in the vicinity of the alleyway near Cherrywood and Mignonette. Appellant, who was placed in Deputy Simon's car, eventually asked Simon why he was being held. When Simon explained the nature of the investigation, appellant responded, "'I don't know nothin' about it, I was in that yard looking at a lawnmower that had been stolen from me.'"

Simon subsequently transported appellant to the headquarters facility on Norris Road. Appellant was placed in an interview room, the door of which was open to the detectives' section. After awhile, appellant said, "'Fuck you Bill.'" When Simon replied that his name was not Bill, appellant responded that he was not talking to Simon, but to Bill Williams, who had walked by. Appellant said he did not like Bill Williams. When Simon remarked that appellant really had a deep-seated hatred for cops, appellant said he had been mistreated by cops all his life and had good reason to hate cops. Appellant said he had been falsely accused by cops on numerous occasions, and related that he had been arrested or charged with crimes 29 times, and that in each case except one, he either had been acquitted or the charges had been dismissed. Appellant said that if Simon had been through what he had been through, Simon would probably hate cops, too.[17]

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[17] Appellant denied making this statement.

Officer Maxwell died from multiple visceral and vascular lacerations due to penetrating shotgun wounds to the chest. Shotgun pellets penetrated or perforated both lungs, the aorta, the trachea, and the left axillary artery and vein. Death occurred within minutes after Maxwell was struck by the blast to the chest. The pellets were about size seven and one-half, which is bird shot, and were fired from a distance of fifteen feet or slightly less.

Maxwell was also struck in the upper part of the right shoulder (in the neck area), as well as on the right side of the face (including the right eye and ear) and on the right hand. Given the area covered by those wounds, this shot was fired from a distance of 15 to 18, up to about 30, feet, depending on Maxwell's position at the time.[18] None of the injuries to the shoulder, face, or hand were fatal.

In addition to the shotgun wounds, both of Maxwell's knees were abraded. The abrasions were consistent with a hard fall to a surface, and the knees of Maxwell's pants were torn consistently with the injures. The injuries to the knees occurred at approximately the same time as the other injuries. Because the shot to the chest would have knocked Maxwell down and it was unlikely he could have gotten up again, Dr.

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[18] If Maxwell was in a locked arm firing position, the spread of the shot pattern indicated a distance of 15 to 18 feet. If Maxwell was just standing there, the spread of the shot pattern indicated a distance of about 30 feet. Dr. Dollinger, who performed the autopsy, was of the opinion that Maxwell was in a firing position at the time he was shot in the shoulder and head, as the wounds were consistent with that position.

Dollinger opined that this was the last shot fired. This scenario was consistent with the extensive bruising associated with the wounds to the neck area However, Dr. Dollinger could not say with certainty which shot was the last one.

Criminalist Gregory Laskowski arrived at the scene of the shooting at approximately 12:15 p.m. He checked Maxwell's weapon, which was stained with blood and had a depression in the grip handle that could have been caused by a shotgun pellet; the chamber and magazine were both empty. Laskowski determined that 12 shots had been fired from the weapon; all 12 spent casings were found at the scene.

Laskowski was able to trace bullet trajectories from the weapon. Through test-firings, he determined that, when the gun was held parallel to the ground, the shell casings ejected to the right. While one casing bounced and landed 10 to 12 feet away, the remainder landed 18 to 21 feet away. From the locations of the shells casings, Laskowski could form a general idea of where the shooter was located, assuming a certain position of the weapon and considering that any individual shell casing could have hit something and bounced or could have been dragged or moved from its original spot. He was also able to relate shell casings to particular shots or groups of shots that were fired. In some instances, Laskowski observed bullet holes or strikes or parts of bullets. Based on those items, he used laser technology to perform a back trajectory analysis to determine the approximate location of the shooter at the time those shots were fired.

The shots were given letter designations for convenience. Shot A struck the lower face of the washing machine in the car garage. Assuming Maxwell was in the area of the front of the El Camino when he fired shot A, he would have been standing and firing downward. Shot B was fired from the area of the left front bumper of the El Camino into the instrument panel of the dryer, which was set against the north wall of the car garage. Maxwell would have been erect at the time this shot, which was slightly downward, was fired. Shot C was fired into the north wall of the car garage, next to the dryer exhaust hose. Maxwell would have been erect and somewhere along the side of the El Camino, probably just in front of the door. Shot D struck the right front fender of the Jaguar, just above the wheel well. It was fired from a position about where the brick fascia ended at the opening of the garage. Maxwell had to have been at or near ground level and firing upward at the time of this shot.[19] Shot E also went into the right front fender of the Jaguar and also had an upward trajectory and backtracked to the brick fascia. If it was fired from that point, Maxwell was in a crouched position no higher than 25 inches; if Maxwell was behind that point, he was almost at ground level, firing up. Shot F perforated the hood of the Jaguar, which was raised, then lodged in the garage ceiling. If Maxwell was at the brick fascia when he fired, he would have been crouched relatively low and firing in an upward direction; if he was back farther, he would have been at ground level. Shot G went into the ceiling and projected back to the area of the brick fascia. Maxwell was probably in a crouched position when he fired. All of these shots were fired in the general direction of the washing machine, approximately in the direction from which the shotgun blast came.

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[19] When the trajectory angles were low, Laskowski could not tell whether Maxwell was prone or kneeling, just that the weapon was low.

Shot H struck the upper area of the north wall of the garage, betwecn the washing machine and dryer and just a few inches below the garage ceiling. This placed Maxwell in a standing position in the area just right of the brick fascia between the car garage and the boat garage. Based on the physical evidence and officers' training, a logical progression would have been that Maxwell started firing in an open position, moved southward around the El Camino and continued to fire toward the garage, then got into a crouched position and continued to fire toward the area of the washing machine.[20] However, Laskowski could not determine whether shot H was fired before or after the series of crouched shots identified as D, E, F, and G.

Shot I struck the north wall of the garage, just down from the ceiling and to the right of the dryer. This shot placed Maxwell in an erect position at the brick fascia between the boat garage and the car garage. Shot J struck the very front edge of the frame header of the garage at the north end of that opening. It was a straight-on shot, almost parallel to the ground, and placed Maxwell along the edge of the fascia in an erect position. This shot was pretty much in line with the spot at which two of the three shotgun shells were found, meaning Maxwell was firing in the direction of the person shooting the shotgun. This shot intersected the shotgun trajectory at some point east of the left front fender of the Jaguar. Shot K struck the stucco wall near the entry of the house, just east of the garage header. It appeared to have a flight line that was relatively parallel to the ground, placing Maxwell in an erect position just east of the fascia which divided the car garage from the boat garage. Again, if the shotgun fired was in the location at which the shotgun shells were found, the trajectory of shot K would have intersected the trajectory of the shotgun blast east of the front fender of the Jaguar. Shot L struck a number of objects and ricocheted, with the bullet ending up near the front entryway. Laskowski determined that shot L most likely was fired when Maxwell was down by the boat trailer tongue.

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[20] Laskowski's opinion, concerning whether Maxwell was erect or in a crouched position when a particular shot was fired, was also supported by the positions of the shell casings ejected from Maxwell's gun.

Laskowski saw three spent shotgun shells in the driveway area of James Sons's residence. One was located just inside the garage, while another was nearby, just outside the garage. All three were fired by the Ithaca 12-gauge pump action shotgun which was found that evening on a shelf just under the roof in a shed at the rear of the residence. Other items on the shelf were dusty, as if they had been in that location for some period of time, while the shotgun was relatively clean.

Five live U.S. Munitions brand 12 gauge shells were removed from the weapon. Laskowski determined that the shell which shot Maxwell in the chest was the red U.S. Munitions shell size seven and one-half shot, which was found just inside the garage door.[21] It was identical in shot size and manufacturer to the live shells found in the shotgun. The pellets which struck Maxwell in the face were size eight shot, which was the size of the other expended shells.

Laskowski was able to trace trajectories for the three shotgun shells. Shot M struck the south doorjamb of the garage. The wadding (shot cup) from shot M was never found. The directionality and size of the shot pattern placed the shooter in the area of the washing machine in the northwest corner of the garage, which was approximately 25 feet from the hinge area of the garage which was struck. The shot size was seven and one-half to eight.

Shot N, which struck the north face of the residence at 6813 Cedarcrest (across the street from James Sons's home) and the mailbox next to 6817 Cedarcrest, came from a point at the left front fender of the Jaguar, passed between the Dodge truck and the boat trailer garage, and crossed the street. The wadding from this shot was found in the center of the street. Laskowski attributed the injuries to Maxwell's face, shoulder, and hands to this shot. Maxwell would have been standing erect, with a slight forward lean, adjacent to the brick fascia wall on which blood was found.

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[21] If fired by a right-handed shooter and held with the barrel parallel to the ground, the Ithaca ejected shells straight downward and perhaps a foot to the right. If held in an upward position while the next shell was being racked (i.e., while pumping the shotgun), the spent shell ejected about eight feet forward. A spent shell had to be manually ejected from the weapon, meaning the gun could be fired somewhere and the spent shell ejected at a different location. According to James Sons, who considered appellant to be experienced with shotguns, appellant was left-handed. Erik Howard, who frequently fired shotguns with appellant and Jeremy while living at the Snow Road property, testified that appellant was a good shot and shot left-handed.

Shot O began in front of the left front bumper of the Jaguar, at the location of the two shell casings, including the red U.S. Munitions shell. Laskowski traced it to the area where it was believed Maxwell was standing when he received that shot. The wadding from this shot was found roughly where the shot terminated, just up from a large blood stain. This was located just east of the brick fascia, north of where the handgun was found, approximately 12 feet from the driver's side corner of the Jaguar. The distance from the red Munitions shotgun shell to the wadding was 12 feet. The wadding was of the same type and manufacture that was found in Munitions brand shotgun shells. Blue polyethylene smears found on Maxwell's uniform shirt compared favorably, microscopically, with this wadding. On the wadding itself, Laskowski found blood and tan polyester fibers consistent with those of Maxwell's uniform shirt. Laskowski also found fibers on the wadding that were consistent with the outer covering of Maxwell's bulletproof vest.

When Laskowski test-fired the Munitions shotgun shells, he obtained a shot patten similar to the one seen on Maxwell's bulletproof vest and chest when the shot was fired from a distance of 12 feet.[22] As this was consistent with the distance from the expended Munitions shell to the wadding,

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[22] Maxwell was struck just at the top of his bulletproof vest.

Laskowski concluded that the muzzle of the weapon was approximately 12 feet away from Maxwell's chest at the time it was fired. In addition, a piece of kevlar (the bulletproof material of the vest) was found inside the boat garage.

Laskowski believed that shot A was fired first. He also believed that Maxwell fired three to five shots before any shots were fired by the shotgun, although this was conjecture, based upon placement of various shots. Laskowski also thought it possible that shot M was an accidental discharge, although he could not say whether it occurred prior to any shots being fired by Maxwell. Shot M was fired from the northwest corner of the garage, across the Jaguar. The two remaining shots were in front of the Jaguar, virtually directly south. There was nothing to show that Maxwell had been shot at the time he fired shots A, B, or C. Although shot D was from a low angle, blood stains did not indicate Maxwell had been hit at that point. Laskowski could not say whether Maxwell had been hit when he fired shot H, although he was erect at that point. Of the shotgun blasts, Laskowski believed the first shot went into the garage door, the second shot struck Maxwell in the face, arm, and shoulder, and the final shot was to the chest.

Laskowski formed conclusions as to the most logical order in which the shots were fired. In drawing these conclusions, he took into account not only the physical evidence (including blood spatters), but also reason and logic, including the idea that someone firing in a certain direction is firing at someone or something. Laskowski also took into account interviews with trained CHP personnel and other police officers. One of the pieces of information he used was that a person normally will not move from a position of protection back to an open position, but is more likely to move from an open position to a position of protection, and to look for a position of cover in response to a perceived threat.

Based on the physical evidence and all of the data that he reviewed, it was Laskowski's opinion that Maxwell began firing into the garage from a location north of the El Camino. In all probability, the first shot was directed at someone or some threat at the front side of the washing machine, where a scabbard was found. For whatever reason, Maxwell then began to move toward the south, where he fired into the instrument panel of the dryer and then into the north wall, until he reached an area of cover. He was moving while firing those shots. Then there was a series of shots from a position of cover next to the brick wall, which were fired toward the Jaguar. Those shots (shots D, E, F, and G) were relatively low, so Maxwell had to have been down on the ground, or falling, or his weapon down at the ground. The scuffs on the knees of his trousers tended to support this. There were no bloodstains there. Maxwell possibly was responding to the shotgun blast that struck the doorjamb (shot M). He was down and firing upward into the Jaguar and into the ceiling. Thus, it appeared Maxwell fired at least three shots before the initial shotgun blast and, for whatever reason, ran clear to get to an area of cover. Although it could not be said whether shot M or shots D, E, F, and G occurred first, it was logical to conclude the officer was down and firing up because the shotgun blast, directed toward the south corner of the doorjamb, would cause someone immediately to duck for cover.

Laskowski believed the shotgun firer moved from the northwest corner of the garage to the southeast corner of the garage. He then moved eastward and, based on the location of an expended shell casing, cleared the weapon at that point. Maxwell then directed shots H and I from the cover of the brick fascia toward the north of the garage. He may have been back in an erect position. At some point, the person with the shotgun fired from the general location of the entry to the garage, just northeast of the Jaguar, in a southward direction, directly toward Maxwell's position. Shots J and K indicated Maxwell was facing directly back at the shotgun fire. At that time, the shotgun firer advanced toward Maxwell's position of cover, in all likelihood firing in that location, ejecting the casing, then firing, then again ejecting the casing. The fatal shot (the United Munitions shell) was fired from a distance of 12 to 14 feet—almost face-to-face. Maxwell being down by the boat trailer tongue accounted for shot L going up into the garage door. Laskowski definitely believed shot L was the last shot Maxwell fired; in his opinion, the officer was prostrate at the time.

The sequence of shots could not be determined with absolute certainty. In Laskowski's opinion, the most logical scenario had Maxwell firing his gun at least three times before he reached a position of cover and before the shotgun was fired for the first time.[23] The shotgun firer then advanced to the corner of the Jaguar and fired the final shot from a distance of approximately 12 feet.

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[23] Because of Maxwell's position, Laskowski did not feel the initial shotgun blast being fired accidentally as the first shot was as logical a scenario.

The Ithaca was capable of holding eight shells. One was removed from the chamber, while the other four were removed from the magazine. When added to the three expended shells found in the garage/driveway area, the shells constituted the maximum load for this weapon. Appellant's fingerprint was subsequently found on this gun.

On the patio chairs, Laskowski saw another shotgun. This was a Winchester model Ranger 120, 12 gauge pump action shotgun, from which Jeremy's palm print was subsequently obtained.[24] The bolt mechanism was halfway engaged, demonstrating that there was nothing in the chamber. The weapon had been fired at some time, although Laskowski could not tell when. The maximum load for this particular weapon was six rounds (five in the magazine and one in the chamber). Trace evidence consisting of brown painted wood and white stucco was found at the top of the mid portion of the ejection port, near the top of the receiver. This was consistent with someone hitting the doorway leading from the garage to the back yard, as he or she went through that doorway. Laskowski was able to exclude the Winchester as being the weapon that fired the three expended shotgun shells.

A white El Camino, license number T38959, was in the driveway. On the passenger floorboard were six live shotgun shells, consistent with the maximum load for, and type of shells that could be fired from, the Winchester. Some, but not all, could be fired from the Ithaca. The shells contained size seven and one-half shot.

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[24] The scabbard found on top of the washing machine did not completely fit the Winchester, leaving about eight inches of the stock uncovered. However, it did fit the Ithaca.

CHP Sergeant Young was an instructor at the Highway Patrol academy on enforcement tactics and officer safety. As such, it was his responsibility to oversee instruction in courses on use of force, patrol techniques (including department policies and procedures), vehicle stops, and crimes in progress and officer safety.

Young reviewed transcripts of the testimony of witnesses in this case, as well as photographs of the crime scene. He was also provided with the findings of criminalists who reviewed the crime scene. It was Young's opinion that at no point did Maxwell use excessive force; rather, his actions were reasonable and, at every opportunity up to the point at which he used his firearm, Maxwell tried to handle the situation using a minimum amount of force.

There are five force options that may be employed by a CHP officer: demeanor, control holds, mace and baton, carotid restraint control hold, and deadly force. Demeanor is how the officer communicates with another person. It involves command presence, tone of voice, body language, and mannerisms. The statement, "I'd rather shoot you than fight you," could fit within a proper use of demeanor or command as, in the situation described by Jeremy, it appeared that Maxwell was trying to control the situation with a minimum level of force.

Use of a control hold is an option that an officer has to control someone who is physically resisting the officer. There is no requirement that an officer exhaust his or her force options in an escalating order. That is determined by the subject with whom the officer is dealing. An officer who is in an arrest situation is not required to back off rather than use force. The Penal Code authorizes an officer to use only the force reasonable to effect an arrest, overcome resistance, or prevent an escape. It does not mandate that the officer retreat, nor does it make the officer the aggressor simply because he or she elects to use force to control the situation. This is taught to CHP officers.

The CHP training manual does not permit the use of deadly force in effecting the arrest of a person who has committed a nonviolent violation of the Vehicle Code, or someone who is being arrested for possessing a stolen vehicle. If an individual complies with an officer's request to stop or to yield or to speak with the officer, and the officer asks for and is provided with identification, and the officer is talking to the person and explaining the reason for the contact, it is not proper for the officer to place the subject in a control hold and bend him or her over the hood of the patrol car. Similarly, it would not have been proper for Maxwell to bend appellant over the hood of the car at the outset, even if Maxwell believed the El Camino might be stolen. If that were the case, Maxwell should have advised dispatch of his location, requested backup, and have drawn his firearm and pointed it at the subject while keeping distance between them. Based on Maxwell's actions in the initial stages of this contact, Young believed Maxwell was implementing a traffic or misdemeanor stop, not a felony stop procedure for a stolen vehicle. Young felt that Maxwell did not have time to follow the recommended procedure for such a stop (running a records check through dispatch, asking for a driver's license or registration, etc.) because appellant immediately accosted him.

The indication from the investigation was that a violation of right-of-way had occurred and that Maxwell drove after appellant's vehicle for that reason. This would not have given Maxwell the right immediately to spread appellant over the hood of the car or twist an arm behind appellant's back. Such a procedure could be used to control a person who was not following verbal commands or who was becoming physically assaultive, or to effect an arrest and handcuff someone. It would violate section 148 of the Penal Code for a driver, stopped for a traffic violation, immediately to come back to the officer, verbally confront him or her, yell obscenities at the officer, and tell him or her to get off the property. This would be a misdemeanor; if the person used physical force in resisting the officer, this would constitute a felony violation of Penal Code section 69. The officer could immediately arrest the person in either situation, and could use force to do so.

Whether the force Maxwell asserted in placing appellant across the hood of the vehicle was excessive depended on appellant's actions up to that point. If appellant had simply walked over and asked Maxwell what he wanted, the force would have been excessive. Similarly, if appellant did not resist Maxwell's control hold, it would have been excessive for Maxwell to twist appellant's arm up behind his back and put pressure on it, causing pain. If, however, appellant resisted, Maxwell was taught to assert the amount of pain needed to stop the resistance. Moreover, an officer may draw (as opposed to fire) his or her weapon if he or she is in danger of any type of battery. By CHP policy, the officer's gun may be displayed in a low ready position with the finger off the trigger. If appellant requested that Maxwell get his sergeant or superior out there after the situation got out of hand, Maxwell should have requested a supervisor.

In Young's opinion, Maxwell moved forward, once Jeremy retrieved the shotgun from the El Camino, to try to control Jeremy and the possible use of the shotgun. Because Jeremy held a shotgun in his hands, Young believed that Maxwell had a reasonable fear of serious bodily injury or death from Jeremy. Maxwell properly could have drawn his weapon on Jeremy at the time he saw the shotgun in Jeremy's hands. While Young did not train CHP officers specifically to say they would rather shoot someone than argue, officers are trained to use voice control. Ultimately, if the officer feels his or her life is in immediate danger or he or she is subject to great bodily harm, he or she can resort to deadly force in self-defense. A homicide by a CHP officer is justifiable if committed in self-defense against an assailant using a deadly weapon or means likely to produce death or great bodily harm. Otherwise, firing a weapon in self-defense is not justified.

In forming his opinions about this case, Young relied in part on the statement Jeremy gave following his arrest. In that statement, Jeremy said that appellant had a gun, but that it was not out until Maxwell started to draw on Jeremy.

Jeremy did not know where appellant got the gun, but appellant was standing in the garage when Jeremy first saw him with it.[25] Jeremy related that James Sons told everyone to stop it, then Jeremy ducked and Maxwell ran around in front of the Jaguar. Jeremy drove to the floor when appellant told him to get down. Appellant told him to get down because Maxwell had a gun on Jeremy and had said he was going to shoot.[26] Appellant was next to Jeremy, a little farther in the garage, shooting over Jeremy. Jeremy did not know who fired first, but thought appellant and Maxwell were exchanging fire.

In Young's experience, it is not common for a person to remove a shotgun from a vehicle in the presence of a uniformed police officer who is attempting to control a situation. If an officer has already fought two people, attempted to use mace, and radioed that he or she has a violation of Penal Code section 148 with two suspects involved, it would be reasonable for that officer to assume the worst when he or she sees one of the combatants remove a shotgun from the vehicle. Use of force—using a baton to try to knock the shotgun from the person's hand—would be reasonable. If the officer felt the subject reaching for the shotgun constituted a threat to his or her life or could cause serious bodily injury to the officer, he or she would be justified in using his or her firearm in self-defense. An officer need not wait until the person turns the gun on the officer in order to use deadly force. If, while Maxwell was in a confrontation with Jeremy, he told Jeremy to put down the shotgun and Jeremy did not; Jeremy used the shotgun in an attempt to block Maxwell's baton; and, while this was going on, Maxwell looked back in the area of the washing machine and saw appellant with a shotgun, it would have been reasonable for Maxwell to assume that his life was in danger from appellant's action. If he did so assume—and Young formed the opinion that he did, based on all the information provided to Young—then he would have been justified under the Penal Code in using deadly force.

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[25] At another point in the statement, Jeremy said the shotgun came from behind the seat of the El Camino.

[26] Maxwell had made this statement when Jeremy was trying to get him to let go of appellant. Jeremy had started to walk toward Maxwell, then appellant broke away and Maxwell pushed him (appellant) and said he would not fight both of them. Maxwell said he would just shoot them, to which appellant replied that if Maxwell started talking about shooting someone, he would lose his badge.

In Young's opinion, based on the information he received, appellant did not have the right to defend himself and his family.[27] Young believed that, no matter how much force is used, or whether guns are pulled and shots are fired, a citizen should wait and try to defuse the situation rather than fire back. Even if the officer is using excessive force, the person can put down the weapon, put up his or her hands, yell to stop, and then trust the officer to de-escalate the use of force.

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[27] Young acknowledged that a person who feels his life and the lives of his family are in jeopardy need not retreat, and that the law gives such a citizen the right to defend himself and others.

CHP Lieutenant Fincel testified concerning the use of a CHP officer's gun, baton, and mace. Maxwell's attempt to knock the shotgun from Jeremy's hand, as described by Jeremy, was consistent with Maxwell's training. Mace causes watering of the eyes, a burning sensation, and other physical symptoms of discomfort, and the person sprayed will want to get away from the mace and will try to rub it off of his or her face.[28] A person against whom it is used will feel like he or she cannot breathe, although this is a false sensation. The effects of mace are only temporary and some people have a tolerance to it such that they basically are immune to its effects. Moreover, mace is not actually disabling; if the person, through force of will, wants to keep moving and doing things, nothing prevents that.

If someone was bent over the fender of a CHP unit in an arm hold and mace was sprayed into his or her face, the person's first reaction would be to pull away. It would be very difficult to try to mace someone in the midst of applying an arm hold, and it would not be standard practice to do this.

Fincel taught Maxwell at the academy. He believed, based on the training his department provided, that Maxwell fully understood the use of force requirements of the CHP and the California Penal Code. In Fincel's opinion, an officer would fire his weapon at a person more than 21 feet away if that person presented a deadly threat. At that distance, this would almost have involve a firearm of some type.

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[28] Fincel himself had mace sprayed in his eyes from less than two feet away. He could not see for about two minutes, and his vision was blurred for another two or three minutes. Wiping the eyes causes the burning to increase. Fincel had no information as to whether appellant was actually hit in the eyes when sprayed by Maxwell, nor what appellant's personal reaction was to mace.

## II. Defense Evidence

As of June 11, 1994, the shop area at the Snow Road property belonged to Jim McManus, the father-in-law of appellant's brother, Dwight Sons. Appellant and McManus had entered into a business agreement. Dwight Sons, who was present during the search of the shop, told deputies that the Corvette had been there for two to three months, and that the Mustang had been there for several months. He also told deputies that appellant had the pink slips for the vehicles in the shop, and that he (appellant) had purchased the Corvette and was awaiting the pink slip. The shop was originally used because the family was involved in stock car racing. Appellant was an exceptional engine builder, and the shop was used to build and repair race cars, and to repair vehicles and farm equipment. Appellant also repaired vehicles for other people. He would grind engine blocks and stamp his own identification number on them, so that when he took an engine to have it machined at the machine shop, he would get back the same block he sent in. When he obtained a stock car and stripped it, he would destroy the license plates to prevent anyone else from using them.

After June 11, Dwight Sons searched through some of appellant's personal effects to see if he could find paperwork for the vehicles in question. He did not find any pink slips. However, sometime after July 11, Vincent Sons went through the paperwork in appellant's bedroom at the Snow Road house. There, he found a pink slip for the Ford Mustang.

On July 11, Victor Smith was driving a pickup truck with Washington plates. Although those plates were not expired and Smith had a Washington driver's license, he did not have a California driver's license. On June 20, Maxwell cited him for not having a driver's license and for having an unregistered vehicle in California. Maxwell acted professionally during this encounter.

Around 7 on the morning of July 11, Smith was on his way to work when Maxwell pulled him over and said he noticed that Smith had not had his plates changed from Washington to California. Smith said he did not plan on staying in California but was intending to return to Washington. Maxwell warned him not to drive the truck again.

Smith had to get to work or he would lose his job. He noticed that Maxwell had pulled someone else over, and he had to get to a telephone to advise his boss of the delay. He attempted to drive the quarter of a mile back to the house at which he was staying, but as he was pulling into the driveway, he saw Maxwell behind him with his lights on. Maxwell got Smith out of the truck, handcuffed him, put him on the back of the patrol car, told Smith that he was taking him to Lerdo, put Smith in the back of the patrol car, searched Smith's truck, and gave him a ticket. They were there 15 to 20 minutes, then Maxwell came back to the car and told Smith it was his lucky day. He let Smith go, then took off up Norris Road.[29] Smith believed that the "upset" he saw in Maxwell was consistent with what Smith had just done in defying the direct order of a police officer.

Around 9 a.m. on July 11, Maxwell stopped by the house of Bakersfield Police Officer Robison, who lived near Maxwell's home. Maxwell's demeanor was fine; as always, he was "a happy guy." Several minutes later, as Robison was on his way to the market, he saw Maxwell turn around and head northbound on Mignonette. Robison then saw a white El Camino being driven by appellant. Both cars passed him and Maxwell, who was on the radio, smiled and gestured a greeting to Robison. Maxwell's actions were consistent with wanting to make a traffic stop on the El Camino. That vehicle, which was traveling very slowly, turned east onto Cedarcrest. Maxwell's vehicle also turned east. Robison did not see its lights on, nor did he see any other cars behind Maxwell traveling the same direction.

On July 11, David Derrick lived at 6905 Cedarcrest, which is across the street and two houses down from James

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[29] According to Juanita Dalton, at whose house this occurred, Maxwell rushed up to Smith's truck, asked what he was doing and used very bad language, and told Smith that he had told him not to use the truck again. When Smith protested that he had to bring it home, Maxwell handcuffed him, shook him against the truck door, and then, after they argued, placed him in the patrol car. Maxwell started to drive away, then turned around and brought Smith back. He turned Smith loose and told him that he would be checking and did not want to see him in that truck again. Maxwell then left very quickly.

Sons's residence. Around 9 that morning, he saw a pickup-type vehicle go by. Several feet behind it was a CHP car. Its light bar was activated, but there was no siren. The cars were not traveling at high rates of speed. The El Camino, which was 150 to 200 feet in front of the CHP car, pulled up in the driveway, out of Derrick's vision. The CHP car pulled up approximately 30 feet into, and at an angle across, the driveway. Derrick did not see another passenger vehicle behind the CHP car, although it could have been there.

Derrick saw the officer exit his vehicle; he then stood by the door as if he was standing for protection. At some point, Derrick heard him say, "just a minute, I want to talk to you[.]" Someone yelled back, "fuck you, you son of a bitch, I don't want to say anything to you[.]" Derrick assumed this was appellant, although both men were out of his vision at this time. At some point, Derrick saw Jeremy step up and push Maxwell. Around this time, he heard Maxwell (or possibly appellant) say, "this doesn't concern you, son[.]" Derrick did not hear Maxwell really raise his voice at any point, although he initially used a command tone. Maxwell pointed to an area up the driveway, then walked out of Derrick's vision.

Derrick went inside to answer the telephone. When he came back outside several minutes later, he heard six or seven shots. A second patrol car arrived a short time later. The only person Derrick saw during the incident was Virginia McKay. He did not know how long she was there, although he told investigating officers that he thought she was there the whole time, even during the shooting. Derrick did not hear any loud shouting during the incident, although it could have occurred while he was on the telephone.

On July 11, Virginia McKay lived at 6812 Cedarcrest, next door to James Sons's home. Around 9 that morning, McKay heard a car drive up. Looking out, she saw a police car. Within a few seconds, she heard hollering. She finished getting dressed and went outside. While she was standing by her car in the driveway, she could see appellant and Maxwell and could hear someone yelling. When McKay first saw appellant, he was at the front part of the gray truck, close to a grassy area. He was bent over and had his hands on his eyes. Maxwell was standing in front of his patrol car. McKay saw Maxwell doing something around his waist on his left to right side, and she could hear Jeremy screaming, "leave my dad alone, what do you want with my dad, don't hurt my dad." She did not see Jeremy.

McKay moved to a spot from which she could see into James Sons's driveway. She saw appellant bend over and Maxwell "messing with things." Appellant lifted his head up toward Maxwell and asked Maxwell what he wanted, but Maxwell did not reply. Maxwell was yelling at appellant and swinging a baton, and they were shouting back and forth. Appellant was asking what he wanted, and Maxwell "was just screaming and yelling," as if he was getting more upset and out of control. When McKay first walked outside, there was no noise, then Maxwell "kind of busted loose" and started yelling and screaming. His words were slurred, and she could not understand what he was saying because he was talking so fast. At some point, appellant yelled at Maxwell to get off his property.

McKay saw both men walk toward the garage as they faced each other. Maxwell was approximately halfway between the vehicles; he brought something up and talked into it, requesting back-up. At that time, appellant was standing one to two feet outside the garage, near the brick area. McKay never saw him go into the garage. As Maxwell called for back-up, he put his baton away and pulled out his gun. McKay saw his thumb go across, then heard a click. The gun was pointed directly at appellant's face.[30] The two men were approximately six to ten feet apart. They had eye contact, then Maxwell told appellant, I'll shoot you before I argue with you." They argued, with both men using profanity, then Maxwell dropped his body into a shooting stance with one leg bent. Appellant was just standing there. McKay did not see a gun in his hand. She then went back into her house because she was afraid Maxwell was going to shoot her. He was acting crazy and swinging his gun around.

McKay went into her bathroom. After three to five seconds (some 20 to 25 seconds after she turned and walked back into her house), she heard eight gunshots, all of which had the same consistency. After the eighth shot, she heard a different gun go off. This gun had a deeper, longer sound. She then heard another short sound, followed by a short sound and a long sound together, and another short sound.

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[30] When McKay was informed that Maxwell's weapon did not have a hammer on it, she said she saw his hand come up and go back. She subsequently stated that when Maxwell pulled the gun out, his thumb went up, she heard a click, and then Maxwell brought his other hand up to the gun and pointed it at appellant.

The last was a short sound that was interrupted with a long sound. Then it was silent.

After McKay realized it was over, she went back outside. She remained outside for 30 to 45 seconds; she never saw a second CHP car. When she went back inside, Jeremy was standing in her living room. She told him to leave, which he did. Despite subsequently being brought out through the area that was cordoned off so she could leave, McKay did not tell officers that Jeremy had been in her house. When she left, she drove to a pay telephone and called Vincent Sons.

Later that day, McKay gave a tape-recorded interview to a defense investigator while at Dwight Sons's home. During this interview, McKay said Maxwell told appellant that he was under arrest. Appellant asked why, but Maxwell would not answer. Maxwell then started yelling at appellant. After the argument went on for awhile, Maxwell got his baton and appellant told him to get off of his property. Maxwell was using foul language. The argument went back and forth, then Maxwell used mace on appellant. Maxwell called for backup; at the same time, he pulled out his gun and cocked it. Neither appellant nor Jeremy had a weapon in his hands when this occurred. McKay described Maxwell as being irate and irrational, while appellant was in an argumentative, but not fighting, state. She denied seeing anything physical occur between Maxwell and appellant, and stated that neither Jeremy nor appellant had any weapons "because I could see 'em." Jeremy did not leave during this period, as he was standing there, yelling at Maxwell to leave his father alone.

The next day, McKay contacted the investigator to correct her statement, as she had not seen Jeremy before he was inside her house. However, she did hear him yelling at the officer. She stated that her overall impression was that Maxwell was acting irrationally from the first time she saw him because of the way he was carrying on, screaming and yelling and not answering any questions.

Appellant testified that at the time of this incident, he and his father each owned a 10-acre parcel on Snow Road. As of July 11, 1994, appellant was in the process of moving out of that residence and sometimes lived at his father's house at 6816 Cedarcrest. Jeremy had lived with him from the age of 16 months. For most of his life, appellant was involved in auto racing. Even after he stopped personally racing on a track, he worked on cars for other people. To this end, he built a large shop at his Snow Road residence, which he used for his race cars and other vehicles, his parts, his tools, and his equipment.

Appellant denied ever owning a chop shop. With regard to the Mustang, appellant loaned some money to Steve Hill, an acquaintance, and was given the pink slip as collateral. After appellant made several unsuccessful attempts to collect the money, he spoke to Hill on the morning that appellant took the vehicle. After their discussion, Hill told appellant where the car was located and to take it.[31]

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[31] Hill testified in rebuttal that he never gave appellant permission to take the vehicle, and did not know appellant had it (continued...)

As for the yellow Corvette, appellant denied that Keese asked him to take the car so Keese could report it to the insurance company as stolen. Appellant made some repairs on the car for Keese, then drove the car for awhile and arranged to sell it, but was unable to contact Keese. As appellant could not arrange for the paperwork on the vehicle, it simply sat in his garage area.

Appellant leased one end of his shop to his wife's nephew, Erik Howard. Howard brought the Chevrolet pickup into the shop. Appellant denied ever having Howard cut up stolen vehicles. Howard worked around the area, but did not work for appellant. Appellant helped Howard learn to do mechanical work. Appellant did not dismantle vehicles to use as parts for other vehicles.

The cash he had at Snow Road, which Erik Howard stole, was a loan from his daughter. It did not come from any criminal activity. Appellant denied ever furnishing drugs to Howard; in fact, he and his wife started the local Mothers Against Drunk Driving (MADD) group. While he was working with that group in Bakersfield, he had a working

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[31] (...continued)
until it was recovered, although appellant did come by his house on the morning Hill discovered the car was missing. Hill admitted testifying before the grand jury that he did not know appellant. He did so because he and appellant had some dealings which Hill thought should be kept quiet. The debt Hill owed him involved methamphetamine, and Hill did not want "to wind up dead." Melody Hill, Steven Hill's wife, testified that a race car, not the Mustang, was signed over to appellant in payment for Hill's debt.

relationship with the CHP, members of which helped facilitate the startup of the group.

Appellant admitted that he was known to have somewhat of a "quick mouth"— when confronted by someone, he was quick to say something back. Appellant acknowledged receiving several tickets in his lifetime and using foul language on occasion when stopped by an officer. In his teens and twenties, he was very mouthy and aggressive. Over time, however, he had mellowed and learned from experience to do what he was told to do by an officer, within reason. Although he had been arrested during the period of 1990 to 1994, he had not had verbal confrontations with police officers to any extent during that time. He had not made any threats to police officers in the five years before trial, despite the fact that he had received traffic citations during that time.

On July 4 or 5, appellant purchased a white El Camino for Jeremy. On the evening of July 9 and early morning of July 10, appellant was at his father's residence on Cedarcrest. He rode a dirt bike out to the Snow Road place around 7:30 or 8 on the morning of July 10. There were no vehicles around, although Jeremy had spent the night at a trailer on James Sons's property. Appellant noticed that the lock had been cut on a double gate at the east entrance to his property. When he and Jeremy realized the El Camino was not there, appellant traced some tire tracks onto Allen Road, headed south. He believed the vehicle had been stolen.

Appellant and Jeremy returned to James Sons's house, where appellant borrowed a vehicle. He then obtained the El

Camino's pink slip from Mike Taylor and started looking for the El Camino in impound yards. When appellant found the car at Bakersfield Club Towing, Jeremy drove the vehicle off the lot, and appellant followed in his father's truck. The towing yard was not locked. Appellant did not notify anyone that he was taking the vehicle.

Appellant and Jeremy returned to the Cedarcrest residence, where appellant worked on the Jaguar. This was Sunday; appellant did not contact anyone in the sheriff's department on this day. That evening, appellant did some work on the El Camino. Jeremy wanted to go hunting at the ranch and persuaded appellant to accompany him. Appellant told Jeremy to get his (Jeremy's) gun, which was in the Jaguar. Appellant himself did not get a gun.[32] Jeremy and appellant drove the El Camino to the ranch that evening.

When appellant arose the next morning, he planned to make some telephone calls in an attempt to find out why the El Camino had been at the towing yard. He did not go hunting, nor did he have the Ithaca shotgun in the back seat of the El Camino. The Ithaca was at his father's house. The last time appellant saw it, it was by the shed in the back.

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[32] As he was in the process of moving, appellant had a number of belongings in the Jaguar. The gun sheath found on the washing machine after the shooting was one of several belonging to appellant, but it was used for appellant's deer rifle, not the Ithaca shotgun. The last time appellant saw it was on Saturday, July 9. It was on the back of the Jaguar and contained a Winchester .44 magnum rifle. Appellant loaned the rifle to his brother.

Appellant had taken it out of the El Camino two days earlier because he needed to do some work on the vehicle. The shotgun, which was habitually kept loaded, was not in a gun case.

On this morning, July 11, appellant made several telephone calls, including ones to his attorney, to municipal court to see if any action had been taken because of the removal of the vehicle, and to Detective Bill Williams.[33] Appellant asked if Williams knew about the incident with the El Camino, as well as the other property that had been taken from the shop. It was not a long conversation; both man became heated and used foul language. Williams said he would not talk to appellant over the telephone, and that if appellant had anything, to come down and see Williams. Appellant told Williams that he had to go to his father's house to get some paperwork, and that he would be down. Ultimately, Williams hung up on appellant. Appellant then telephoned Bakersfield Club Towing and informed the person there that he had the El Camino.

When appellant left the Snow Road residence that morning, Jeremy's gun was already in the front seat of the El Camino. There were also shotgun shells, which he and Jeremy had gathered the night before when Jeremy wanted to go hunting. Jeremy had a job interview arranged for that morning.

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[33] Appellant had tried unsuccessfully since June 11 to contact Williams regarding the items that were taken from his property. He had even contacted the attorney general's office in Sacramento.

Appellant drove directly from Snow Road to his father's house. As he pulled into the alleyway that runs east to west from Patton to Mignonette, he did not see any patrol cars. When he got to the end of the alley, there was a CHP unit to his left, going south on Mignonette. Appellant stopped at the alley. As the CHP unit passed the alley, it stopped, partially blocking the exit of the alley onto Mignonette. It then backed up, as if to let appellant out. Appellant recognized Maxwell, whom he had met three or four times prior to this occasion. None of those meetings had been confrontational. As appellant turned in front of Maxwell, they made eye contact and waved, appellant proceeded on past, and Maxwell turned into the alley. Appellant drove on to his father's house, pulled into the driveway, and parked.

Appellant exited the El Camino, took a box containing tools, clothes, and other items out of the vehicle, walked into the garage, and set it down next to the Jaguar. Maxwell had not yet come into the driveway. Appellant walked back out to the El Camino. Meanwhile, Jeremy got out of the El Camino and walked off. Appellant was not watching where he went.

When appellant returned to the El Camino, he heard a car stop. He looked up; it was the CHP unit, and Maxwell exited the vehicle. At some point, he said to appellant, "'Get, get over here.'" Appellant walked over to him and Maxwell told him to put his hands on the car. Appellant, who said nothing, placed his hands on the front driver's side of the CHP vehicle. He asked what was going on, but did not use foul language at that point. Maxwell then frisked him.

Appellant believed that during this time, Jeremy was to the left of and behind appellant.

Maxwell pulled appellant's right arm off of the hood of the car and put appellant in a wrist lock. Maxwell stepped in to appellant, as if to shield the two men from Jeremy. Appellant looked around to see what was going on; he saw Jeremy coming up. As appellant was coming around to see where Jeremy was and was hearing him, Maxwell was pushing appellant over. Appellant looked at Jeremy, who said, "'What are you doing to my dad?'" Appellant told Jeremy, "'Son, don't worry about it, it's okay, it's all right.'" When they spoke, Jeremy was still coming toward the men, and Maxwell took his forearm and shoved appellant into the hood. At that point, appellant was facing the windshield. He asked Maxwell, "'What the fuck you doin'?'" Maxwell did not answer, but appellant heard him say, "'Back off,'" and "'Back off son.'" Jeremy was still coming toward them. Neither Jeremy nor Maxwell had anything in his hands at that point.

When Maxwell shoved appellant onto the hood and appellant looked up and asked what he was doing, Maxwell had mace in his hand and was spraying it toward Jeremy. Jeremy backed away and threw up his hand. Maxwell then turned the spray on appellant and sprayed him in the face from a distance of six to eight inches. Appellant twisted out of Maxwell's hold and moved in Jeremy's direction. As he did this, Maxwell backed off. Maxwell said, "'I'm not fightin' both of you, I would just a[s] soon shoot you,'" but no gun was pulled. Appellant did not know where he himself was, as he was having a reaction to the mace. He wiped his face, which seemed to enhance the burning, and he could not breathe.

The next time appellant saw Jeremy, the youngster was near the rear of the El Camino. Appellant, who was still reacting to the mace, walked toward Maxwell. Appellant, who was very angry and was probably using foul language, asked Maxwell what he wanted and why he did that. Maxwell was initially on the outside of the open door of the patrol car, but when appellant walked in line with him, Maxwell stepped behind the door. Appellant stayed where he was at. By this time, appellant could not see out of his right eye and had only partial sight in his left eye.

Maxwell reached into the patrol car and grabbed his radio. After, he walked around the door and came toward appellant. Using foul language, appellant told Maxwell to get off his property. Appellant did not have a weapon and did not know where Jeremy was. By this time, Maxwell was as angry as appellant. Maxwell grabbed his baton, threw it up in an armed position, and told appellant to "come on." Appellant went toward him, but Maxwell backed up. Maxwell ended up at the rear of the CHP vehicle, and appellant was behind the open door. Appellant, who still could not see clearly, never made physical contact with Maxwell.

After appellant and Maxwell moved toward the rear of the patrol car, they stopped, then appellant turned and walked away. Maxwell followed. Appellant noticed Jeremy, who was at the rear of the El Camino. Jeremy called, "'Dad!'" From the way he said it and the way things had escalated, appellant knew what he meant and spun around to face Maxwell. Maxwell was coming at appellant, who grabbed the door of the patrol unit and pushed it between them. He never shoved or made physical contact with Maxwell. Both of them were yelling and screaming. Appellant told Maxwell to get the field sergeant out there. Appellant used foul language. When appellant demanded that Maxwell get his boss, Maxwell reached back in the unit and grabbed his microphone again. When he did that, appellant walked up to the garage. He did not have anything in his hands, nor did he see Jeremy with anything in his hands.

Appellant went into the garage, where he had placed the box of things from the El Camino. There was a water bottle there, and he took a shirt out of the box, poured water on it, and wiped his face. When he looked up, he saw Maxwell running up to the passenger side of the El Camino. Appellant, who was still blind in his right eye, could not see Jeremy, but believed he was at the front of the car. Appellant stepped forward, by the front corner of the Jaguar, as Maxwell had gotten out of his sight and was around the front of the El Camino. Jeremy was backing up. Appellant did not see anything in his hands. Appellant lost sight of the two, although he assumed they were near the front of the El Camino. He did not hear either of them say anything, nor could he tell what Maxwell was doing.

Appellant moved more toward the front of the Jaguar. From what he heard and saw in silhouette, he believed Maxwell moved toward the Ford truck. Appellant could not tell whether Maxwell or Jeremy had something in his hands.

He did not hear a verbal confrontation between them. At some point, some distance opened up between Maxwell and Jeremy. Appellant could not recall what Jeremy was saying.

Appellant lost sight of the silhouettes and moved farther back into the garage. He heard something to the effect of, "'drop it or I'll shoot you.'" He could see Maxwell's silhouette between the El Camino and the garage, and he could hear Jeremy off to his (appellant's) left. Appellant was facing the house, then turned around the second time he heard, "'I'll shoot you.'" Appellant, who did not see any guns, still could not see well and was suffering a painful reaction to the mace. He heard something, which he later found out was Maxwell's baton, hit the ground. Appellant could tell from the sounds that Jeremy was inside the garage area. As appellant made a turn around the rear of the Jaguar, he saw an arm come up and heard two shots.

When the rounds started going off, appellant had turned and started out, near the right front fender of the Jaguar. Maxwell was moving from the front of the El Camino in a southwesterly direction. He had fired a couple of rounds when he tripped and fell. At that point, appellant was at the right rear corner of the Jaguar. As appellant came around the Jaguar, he saw Maxwell come up in a locked arm position. Maxwell was still moving and firing. He was in the open from the time he left the other side of the El Camino.

When appellant reached the back of the Jaguar, he saw Jeremy at the left front corner of the car. Jeremy was frozen in a half-crouched position. Appellant could tell he was holding something, but could not see what it was. Three or four shots had already been fired, and appellant felt something strike the Jaguar. Appellant could not see Maxwell. When appellant reached Jeremy, however, Maxwell was down, having tripped and fallen as he was moving to the southwest. Maxwell was still firing. These shots went into the fender of the Jaguar.

Appellant grabbed Jeremy and pulled him back, then lost his balance and they crashed into the dryer. Maxwell, who had started back to the northeast, fired two more rounds. One struck the control panel of the dryer, while the other hit to appellant's right, above him and between the washer and dryer. At this point, neither appellant nor Jeremy was armed. They were both on the ground, crawling toward the back of the garage. Appellant still had hold of the youngster, and did not know what had happened to Jeremy's shotgun.

Appellant was by the washer, going in the back door of the house, when a round struck the washer and turned him. Appellant had let go of Jeremy by this point. He thought Jeremy was coming with him as he headed toward the back of the garage. When appellant worked his way to the washer and was going to the back door, a round hit the washer, and he turned away from it. He discovered then that Jeremy was not with him, but was back between the washer and dryer. By this time, Maxwell had fired a number of rounds, having fired another four while he was moving back to the northeast.

When Jeremy came from between the washer and dryer, appellant could see that he had something. Although appellant did not know it until later, it was a shotgun. Appellant did not know whether it was the Winchester or the

Ithaca. Jeremy crawled from the washer-dryer area toward the front of the Jaguar, and appellant stood up and ran to him. When appellant came up to Jeremy, they were at the left wheel of the Jaguar. Jeremy was almost in a three-quarter position, semi-crouched and coming up, facing toward Maxwell. Seeing that Jeremy had a gun in his hand and fearing for him, appellant grabbed the butt of the gun and it went off. The round struck Maxwell in the chest from a distance of eight or ten feet and knocked him back to the edge of the garage overhang. Appellant took the gun away from Jeremy, pulled it around, came up, and reloaded. Maxwell was moving back toward the southwest and was still firing. Appellant, who was in a crouched position next to the fender, reached around the front of the car and fired a round without aiming. The round struck Maxwell in the right side and hand, and he went down. Appellant could only remember the two rounds, and did not remember the shot being fired that struck the area of the garage door hinges. He also did not remember racking another round into the chamber.

Appellant asked Jeremy if he was all right, and either set the gun down, handed it to Jeremy, or Jeremy took it. Appellant walked to the front of the Jaguar, toward Maxwell. Everything was quiet.[34] Maxwell was laying by the boat. He was bleeding badly. Appellant walked over to him and was there a few seconds, then another CHP unit arrived. Appellant went back to the front of the Jaguar on the driver's side, then, when an officer exited the patrol car and drew his gun, fled. He ran because it looked as if another gun battle was going to start.

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[34] Appellant estimated that the entire sequence of events lasted no more than 25 seconds.

Appellant testified that he did not intentionally pull a gun out of a gun case and aim it at Maxwell to kill him. Appellant shot because he was being shot at, and he feared for his life and that of his son. He did not have any hatred toward Maxwell. He did not stand up and tell Maxwell not to shoot because it was too late: Maxwell was already firing. When appellant fired the shotgun, there was no intent to kill. He intended to grab the gun and his boy out of the way. When he reached around and fired the second shot, he did so because there was still fire coming. Appellant recognized that he had an attitude problem, but did not believe that it initially created the situation at his father's house. However, he thought that his and Maxwell's personalities took over and escalated matters.[35]

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[35] Laskowski testified in rebuttal that, in his opinion, the physical evidence did not support appellant's version of events. After hearing appellant's testimony, it remained Laskowski's opinion that Maxwell was standing in an erect firing position in the area of the brick wall when he was struck in the chest, and that all of the physical evidence supported that opinion. However, he conceded that certain variables had to be taken into account, and one had to be aware of the possibility that something had been kicked or otherwise moved out at the scene. If any of the data Laskowski saw at the scene had been changed in any way, his assumptions and conclusions might not necessarily be the same. It would depend on what data was changed. Laskowski thought it "highly unlikely" that four significant pieces of evidence—two pieces of kevlar, blood spatters, and shotgun wadding from United

(continued...)

## DISCUSSION

### I.
### Deprivation of Exculpatory Evidence

Appellant contends his murder conviction must be reversed because he was deprived of critical exculpatory information that was contained in Maxwell's personnel records and the CHP report entitled "OFFICER INVOLVED SHOOTING INVESTIGATION" (commonly referred to as the shooting incident report), especially Annex A thereto.

As a preliminary matter, a question has arisen as to whether, in light of Maxwell's death, his personnel records, Annex A, and the parties' briefs referencing same should remain confidential. The privilege against disclosure is held by both the individual officer and the law enforcement department. (*Michael v. Gates* (1995) 38 Cal.App.4th 737, 744; *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401; see also *San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189-190.) In an order previously issued in this case, we deemed respondent's failure to object to disclosure of the information to the parties, to constitute consent to such disclosure and, hence, waiver of the privilege. However, this does not constitute a waiver for all purposes, and it is clear from respondent's brief that the privilege is being claimed.

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[35] (...continued)
Munitions—which were all found in the area of the brick wall, could have been kicked or moved inadvertently and all ended up in the same spot.

Appellant asserts that any citizens' complaints contained in Maxwell's personnel files and any response thereto have never been confidential because Penal Code section 832.7 "specifically obligates the department to provide to the citizen complainant copies of his or her statements and notify the complainant, in writing, of the disposition of the complaint." Since the complainants are free to disseminate those materials, the argument runs, any assertion of confidentiality is undermined. However, provision of copies of statements and notice of the disposition of complaints does not remove confidentiality from the personnel records themselves. Indeed, subdivision (a) of Penal Code section 832.7 makes clear that such materials are confidential.[36]

In light of our determination, *post,* that appellant is not entitled to reversal based on nondisclosure of the various materials, we conclude that confidentiality still should attach, and we deny appellant's request to unseal Maxwell's personnel records, Annex A, and the parties' briefs on this appeal. Accordingly, while we have reviewed the record in its entirety, including the sealed exhibits and reporters' transcripts, we do not describe the confidential materials in detail in our opinion.

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[36] Penal Code section 832.7, subdivision (a) provides: "Peace officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code...."

### A. Procedural History

On August 25, 1994, appellant filed a written motion to obtain complaints against, and psychological reports of, Officer Maxwell. In their supporting declaration, defense counsel[37] asserted that the defense sought to show that any force employed by appellant was used in self-defense against acts of excessive and illegal force; that the material sought might contain similar citizens' complaints; and that such information would be used to locate and call witnesses to testify that Maxwell had a character trait, habit, and custom of engaging in excessive and illegal force.

The motion was heard on September 13. The CHP (represented by the Attorney General's Office) argued that the defense had failed to show good cause for disclosure in that it had made no showing of any facts to support any use of excessive force; there was no statement as to what charges had been brought in the case; and there was no showing with any kind of particularity as to what excessive force, if any, was used by Maxwell. The CHP also argued that, under the relevant Evidence Code sections, any conclusions by investigating officers had to be excluded. Appellant responded that, because he was indicted by a grand jury and had had no preliminary hearing, he was somewhat hampered in setting out facts, but that there was at least one witness who had said Maxwell acted irrationally at the scene. Accordingly, he asked the trial court to review the records in camera.

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[37] Appellant was represented by Donnalee H. Huffman and Troy L. Childers.

The trial court denied the motion without prejudice based on an insufficient showing of good cause. The court determined that "a conclusionary allegation ... that the officer used his baton and gun before his backup arrived on what was apparently, quote, not a felony stop does not assist us in establishing the relevancy of the—of late Officer Maxwell's personnel records." The court noted that the declaration in support of the motion did not contain any specific factual allegations against Maxwell and did not have appended to it a copy of the police or CHP report for the incident. (See Evid. Code, §§ 1043, subd. (b)(3); 1046.)[38]

On October 7, 1994, appellant filed a motion for disclosure of impeachment and exculpatory evidence. In part, he sought discovery of "[a]ny internal documents or other evidence of any law enforcement official's misfeasance, malfeasance or negligence whether by acts of omission or commission, in the performance of his/her duties, concerning this specific case," as well as various CHP manuals and policy statements. Appellant also requested "[a] copy of C shooting teams [*sic*] internal report regarding the shooting of Officer Maxwell." Appellant requested this material pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny. In pertinent part, the People responded that any records had to be obtained using the procedure outlined in section 1043, and that the CHP intended to claim the privilege for official information.

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[38] Further statutory references are to the Evidence Code unless otherwise stated.

The motion was heard on October 21. During the hearing, the prosecutor asserted that there had been no showing of relevance as to the requested items, in addition to which he could not obtain them from the CHP. Accordingly, he suggested that the defense seek the items from the CHP, either by way of subpoena duces tecum or motion to produce. The court agreed that the CHP should have the opportunity to respond and to raise any claims of privilege.

On October 28, 1994, appellant filed a written motion to compel discovery pursuant to section 1043, i.e., a "*Pitchess* motion" (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 [hereafter *Pitchess*]). In it, he sought (1) names, addresses, and telephone numbers of percipient witnesses to prior acts of violence by Maxwell; (2) Maxwell's statements to Internal Affairs (IA) investigators regarding any of the incidents that were the subject of citizen complaints; (3) complaints of false arrest; (4) all records of discipline imposed as a result of investigations into citizen complaints or IA investigations concerning Maxwell's tendencies to violence; (5) copies of all citizen complaints filed against Maxwell, regardless of whether they were sustained or exonerated; (6) LA investigative records concerning alleged misconduct which occurred when Maxwell was off-duty; (7) all records of complaints regarding racial or ethnic prejudice or sexual discrimination; (8) all reports concerning incidents in which Maxwell discharged a weapon; (9) mental health records and evaluations of Maxwell which might indicate a mental or emotional condition constituting a danger to himself, other officers, or the person or property of another, (10) all records of complaints wherein Maxwell assisted another officer against whom a complaint was filed for excessive force or false arrest; and (11) names and addresses of any law enforcement agency which employed Maxwell prior to the CHP. In part, appellant claimed the information was necessary to corroborate defense testimony that appellant only used force in self-defense; that Maxwell's use of excessive force in the instant case was consistent with a pattern of conduct; and that the complaints and investigations would tend to show, or would lead to evidence tending to show, a propensity on Maxwell's part to engage in the use of unlawful and excessive force in the execution of arrests, detentions, and investigations.

At the hearing on November 14, it was stipulated that the matters ordered disclosed by Judge Gildner on October 3, 1994, in Jeremy's case (Kern County Sup. Ct. No. 77558), would be disclosed to the attorneys in appellant's case.[39] As reflected in Judge Gildner's minute order, Judge Gildner conducted an in camera review of records submitted by the CHP and ordered disclosure of "the names, addresses and telephone numbers (if any) of the complaining and percipient witnesses(es) [*sic*] identified in complaint investigation numbers 42094011, 42090043, 42093020, 42094008, 42092019 and 42092024." Defense counsel both agreed with the court's assessment that the stipulation "essentially resolve[d]" the *Pitchess* motion which was calendared for that morning.

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[39] On November 9, 1994, Jeremy (who was not tried as an adult) was found to have committed second degree murder, together with various other offenses, arising out of the events of July 11. We affirmed *(In re Jeremy S.* (Jan. 8, 1996) No. F023104). In part, we found no error in Judge Gildner's ruling on Jeremy's *Pitchess* motion. We take judicial notice of our records in case number F023104; however, we reject respondent's suggestion that principles of collateral estoppel require the same result here. Prerequisites for application of the doctrine, which is one aspect of the doctrine of res judicata (*County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1843), include the requirement that the party against whom collateral estoppel is asserted must have been a party or in privity with a party at the prior proceeding. (*People v. Torres* (1992) 6 Cal.App. 4th 1324, 1329.) Appellant was neither a party to the action involving (continued...)

On December 9, 1994, appellant filed a written motion *in limine* for shooting reports. In pertinent part, he requested a copy of the written report which CHP policy required be originated by the immediate commander, and

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[39] (...continued)
Jeremy nor was he in privity with his stepson. (See *Shasta, supra,* at p. 1843 ["'The parent-child relationship ... is traditionally excluded from privity notions for res judicata purposes.' [Citation.]"].) In addition, there would appear to be no privity because appellant's interests and Jeremy's interests were not identical, as their theories of defense differed. (*Ibid*) Moreover, even if we were to find at the threshold requirements for application of the doctrine were met here, we would question whether respondent has "establish[ed] that its assertion of the doctrine ... is consistent with principles of due process and sound judicial policy. "'Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial.'" [Citation.]" (*Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 169.) Whether defense counsel's stipulation to Judge Gildner's ruling resulted in some sort of waiver on appeal is a different issue which will be discussed *post*.

submitted to the CHP commander, following the incident; the memorandum of findings concerning the propriety of the discharge of Maxwell's weapon, as required by CHP policy, including a copy of all materials reviewed by the person or persons who drafted the memorandum; and materials reviewed by, and the evaluation and analysis of the incident made by, the shooting review board, including all written materials that were directly produced as a result of the shooting board investigation. Although the CHP agreed to provide portions of the requested information, it objected to the bulk of the requests on the grounds that the information was protected by the official information privilege (§ 1040), as well as by the work product and attorney-client privileges. In addition, the CHP represented that parts of the report were kept in Maxwell's personnel file and thus were not subject to disclosure except pursuant to section 1043. The CHP also represented that no shooting review board was convened concerning this incident.

The motion for shooting reports was heard on December 16.[40] The CHP agreed to provide copies of Maxwell's training records concerning the use of firearms. However, it objected to disclosure of the report generated by the commander. The CHP represented that the report is generated, in the usual case, where there has been an officer-involved shooting, as the CHP wants to see if the officer acted properly in order to take corrective or disciplinary action if he or she did not. This rationale was not applicable here, as the officer was deceased. The other reason the report was prepared was in anticipation of litigation in terms of civil liability. Accordingly, the CHP argued, the report fell within work product or attorney-client privilege. The CHP asserted that even if the reported findings were disclosed, they would not be admissible because the conclusions and findings would be protected by the official information privilege. The CHP further argued that, as the defense would have access to witness statements and the other information from which the CHP drew its conclusions, the defense would be able to argue its own conclusions from the evidence. However, the CHP's conclusions and analysis were privileged.[41]

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[40] During this time, the court was also dealing with a motion for discovery of the CHP's training and policy manuals and similar information. Since no issues are raised on appeal concerning disclosure or nondisclosure of such information, we will not summarize those hearings.

The court decided to conduct an in camera review with regard to the report and the request for the memorandum of findings. It found the defense request moot with regard to the shooting review board, as no such review board was convened in this case. This colloquy took place with regard to the report:

Appellant pled not guilty and denied the special allegations. The prosecution sought the death penalty.

> "THE COURT: ... I would like to conduct an in-camera review of the report. I will share with you now what I'm basically going to be looking for. I'm going to be looking for anything that is in there that

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[41] The prosecutor did not take a position on the defense request.

is a result of immediate perception. I suspect that I will find that everything that would fit within that category would also fit somewhere within the nine enumerated items.

"I don't believe it's going to be my intent or my ruling that if there are opinions voiced in that in terms of whether the officer performed properly or not, that I'm going to release that because irrespective of the concerns that you have raised with regard to work product, with regard to for training purposes, with regard to civil liability, with regard to anything else like that, I think it still would come down to being nothing more than an expression of opinion. And if the opinion expressed is that he did everything right, I'm not going to allow Mr. Tauzer [prosecutor] to utilize that. And if the opinion is that he erred in some particular fashion, I'm not inclined to allow the defense, Mrs. Huffman, to use that. I'm going to surmise that that's probably what I'm going to think, but I won't know until I look at it. So I do want to do that and, Mrs. Hunter, is that available today?

"MISS HUNTER [deputy attorney general]: Yes, it is, your Honor. This is it.

"THE COURT: Okay. You just pointed to a binder that appears to be about four inches thick.

"MISS HUNTER: That's correct, your Honor. The report itself is not that long.

> "THE COURT: It's just a small portion of all those materials?
>
> "MISS HUNTER: Well, I mean technically the entire binder is the, quote, shooting investigation report.
>
> "THE COURT: Okay. Hang on to that. The way I do my in cameras is to have you in here but not any of the other counsel. We will go on the record and, if convenient, have someone here with us as a witness who can assist in identifying the document as well as particular portions thereof and we will go ahead and do that all on the record."

The in camera hearing began on December 16. This court has reviewed the transcripts of the hearing (which continued on Dec. 27), as well as the documents reviewed by the trial court. To summarize, the CHP agreed to release diagrams of the scene photographs, descriptions of certain other items, and a list of expended cartridge cases and bullets. Beyond those items, the trial court ordered disclosure of radio transmissions; certain identification information concerning Maxwell, appellant, and Jeremy; and Maxwell's annual weapons inspection and officer safety certification. Significantly, given the issues on appeal, it ruled that there would be no disclosure of Annex A, which consisted of a profile of Officer Maxwell. The court found that those parts of the shooting incident report prepared by the CHP and not ordered disclosed were protected by the privilege for official information.

As a result of the foregoing proceedings, at the beginning of trial appellant (and, insofar as the record shows, the prosecutor) possessed the names, addresses, and telephone numbers of complaining and percipient witnesses with regard to certain complaints lodged against Officer Maxwell. Appellant did not have any portion of the shooting incident report which dealt with this the subject.

In his opening statement, the prosecutor described this case as "a tragic tale of a dedicated law enforcement officer killed for no reason in the line of duty." The defense theory was that Maxwell acted unreasonably and unlawfully in using deadly force against appellant, Jeremy, and James Sons, and that appellant acted in defense of self and others.

On February 1, 1995, CHP Sergeant Young testified as an expert on the use of force by a CHP Officer. As described in the statement of facts, *ante*, Young gave the opinion that Maxwell did not use excessive force at any point during his contact with appellant, and that Maxwell's actions were reasonable. Appellant subsequently objected on the ground that "opinion of excessive force is a fact-finding decision for the jury to find based on the facts presented as to whether or not the officer was using excessive force." The motion was denied.

On February 3, appellant orally renewed his request for discovery of the shooting incident report based on Young's testimony. Appellant also renewed his request for CHP policy and training manuals, based on the testimony of Young and Lieutenant Fincel. The prosecutor stated that he did not have a position on the subject, but that the CHP needed to be notified. The court denied the oral motion without prejudice due to lack of notice, and directed defense counsel to prepare a written motion and notice the attorney general's office. The motion was filed that same day. The CHP subsequently filed a motion to quash the defense's subpoena duces tecum.

The motions were heard on February 8. With regard to the shooting incident report, the trial court ruled that it should be disclosed, subject to a protective order, because of the opinion voiced by a CHP officer (presumably Young) during trial. Ms. Sierra, the deputy attorney general appearing on behalf of the CHP, asked whether this shooting incident report was the subject of the prior in camera review, and whether the court was talking about disclosing a hundred pages or more. The court replied that it had in mind something shorter that it previously had reviewed, and directed her to bring in what she perceived to be the shooting report in order to make sure she was not disclosing more than what needed to be disclosed.

The next day, this took place:

> "[MRS. SERRA:] Yesterday a question arose as to what the defense was referring to in their request, and apparently they were not referring to the large binder that this court had previously reviewed, perhaps a portion of that binder only.
>
> "And we reviewed that binder which is presently under seal with the court and we determined that perhaps there were two portions that could really

be considered the incident report. One chapter dealing with investigative summary and one with investigative findings. So we prepared those.

"The defense counsel had indicated that she was referring to a four-page report. And the investigative findings are four pages. That was the only portion that was four pages. And they are—realistically it seems to be in the spirit of the ruling that would be appropriate to present to counsel.

"THE COURT: Mrs. Huffman?

"MRS. HOFFMAN: Your Honor, as the court knows, I was referring to a four-page report because that's the information that I had been given that there was. I don't know what's in the shooting report, the investigating report, so I'm going to have to defer to the court on this. The court has looked at it. I haven't seen it.

"The only reason I reported a four-page report is because that was the information Mr. Tauzer had given to me with regard to a shooting report that he was aware of when he went to the CHP academy or CHP office in Sacramento around Thanksgiving, I think is what he was talking about.

"THE COURT: But you remember yesterday that he indicated that his recollection on that particular point is to the contrary.

"But let's not get bogged town, please, in who may have said what or how the four-pager—how the four-page reference arose.

"Counsel, why don't you give both of them, both the findings as well as the summary—

"MRS. SIERRA: That's fine."

Without further in camera review of court's exhibit 1, the CHP disclosed to both parties chapter III ("INVESTIGATIVE SUMMARY") and chapter IV ("INVESTIGATIVE FINDINGS") of the shooting incident report. The court subsequently determined that Sergeant Young had reviewed those materials; accordingly, both parties were permitted to examine Young with regard to them, despite the court's protective order.[42] Defense counsel later examined Young concerning such factors as his belief, based on the departmental shooting investigation, that appellant had a shotgun in his possession when Maxwell drew his own firearm. Defense counsel also questioned Young concerning what might constitute excessive force in a particular situation, such as if a person calmly asked what the officer wanted and the officer grabbed that person and pushed him or her over the hood of a vehicle.

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[42] Young subsequently testified that he was aware of some of the facts in this case, but had not listened to all of the testimony. He stated, "I briefly reviewed the department's shooting investigation and material provided to me from Deputy District Attorney Tauzer up to this point but not all of the information, no." Subsequently, when questioned about evidence concerning whether, when Maxwell fired the first shot, he was confronted by deadly force, Young testified, "The only information I have is what was in the departmental shooting investigation as to that he had the possession of the shotgun. As to who actually discharged a weapon first, no ..., I'm not aware of that." Still later, Young was asked if he had any knowledge as to whether Jeremy questioned Maxwell about what Maxwell was doing to appellant and whether Maxwell's reaction was to mace Jeremy. Young replied, "Other than the information in the shooting investigation again and what Mr. Tauzer has provided me, that's all that I have."

(continued...)

Maxwell's widow, Marlene, testified that on the morning of his death, Maxwell was in the same kind of mood as always—"he's very quiet, very mellow." As set out in the statement of facts, *ante,* evidence was presented concerning

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[42] (...continued)

From the beginning, appellant argues that Young was provided with Annex A, and that had Annex A been provided to the defense, cross-examination of Young would have been "far different," in that the sustained complaints not only undermined Young's opinion, but also his credibility "in view of the fact that they were set out in the report that he reviewed (but ignored)."

We disagree with appellant's assumption that Young was provided with Annex A. Later in his testimony, he referred to "[t]he statements *again* from the summary of the incident and the information that Mr. Tauzer has provided me," i.e., witness statements. (Italics added.) Young subsequently testified that he was familiar with the shooting report and, when asked whether he had been given a copy that morning to look at, he testified that he had been given "just a copy of the investigative summary." It is apparent that Young had been provided with information concerning what occurred during the incident between Maxwell and appellant. We find nothing in Young's testimony to indicate he had seen or relied upon information contained in Annex A or Maxwell's personnel file.

other contacts Maxwell had that morning. However, the defense did not present any evidence related to complaints which were filed against Maxwell and which were disclosed pursuant to the *Pitchess* stipulation.

The jury was instructed on numerous concepts, including first and second degree murder, voluntary and involuntary manslaughter, heat of passion, and perfect and imperfect self-defense and the defense of others. In particular, the jury was instructed concerning the relationship between a peace officer's use of excessive force and his being engaged in the performance of his duties, the relationship between a peace officer's use of excessive force and self-defense, and the relationship between a person's being the initial aggressor and a peace officer's use of excessive force.

## B. Analysis

Appellant's claims concern two types of information: Maxwell's personnel files and Annex A of the shooting incident report. As to both, he asserts error under state law and the federal Constitution.

### 1. Maxwell's personnel files[43]

#### a. *Pitchess*

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[43] We decline to determine the propriety of the trial court's ruling on each particular discovery motion. Instead, we concern ourselves with the end result: pursuant to stipulation, appellant received the information ordered disclosed in Jeremy's case.

"The power of a trial court to provide for discovery in criminal cases exists 'even in the absence of constitutional mandate or enabling legislation.' [Citation.] Such power is among those inherent in 'every court to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of the truth.' [Citation.]" (*People v. Memro* (1985) 38 Cal.3d 658, 677.)

> "These principles were applied in *Pitchess* to permit the discovery of police personnel records. As [the California Supreme Court] explained, a criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.' (*Pitchess v. Superior Court, supra,* 11 Cal.3d at p. 535.) *Pitchess* made it clear that 'an accused ... may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.' (11 Cal.3d at p. 536.) In contrast to the detailed showing required by some civil discovery statutes ..., the requisite showing in a criminal matter 'may be satisfied by general allegations which establish some cause for discovery' other than a mere desire for all information in the possession of the prosecution. (11 Cal.3d at pp. 536-537.) The information sought must, however, be 'requested with adequate specificity to preclude the possibility that defendant is engaging in a "fishing expedition."' (*Id.* at p. 538.)" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84-85.)

In 1978, the Legislature codified the privileges and procedures surrounding *Pitchess* motions by enacting Penal Code sections 832.7 and 832.8,[44] and Evidence Code sections

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[44] In 1994, when the motions at issue were decided, these statutes read:

*Penal Code section 832.7*—

"(a) Peace officer personnel records and records maintained by any state or local agency pursuant to Section 832.5 [requiring each agency employing peace officers to establish a procedure to investigate citizens' complaints against department personnel and to maintain complaints and findings or reports for at least five years], or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceedings except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of police officers or a police agency conducted by a grand jury, a district attorney's office, or the Attorney General's office.

"(b) Notwithstanding subdivision (a), a department or agency which employs peace officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

"(c) Nothing in this section shall prohibit a department or agency from notifying the complaining party of the disposition of his or her complaint.

(continued...)

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[44] (...continued)

"The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before an arbitrator, court, or judge of this state or the United States.

"(d) Nothing in this section shall affect the discovery or disclosure of information contained in a peace officer's personnel file pursuant to Section 1043 of the Evidence Code."

*Penal Code section 832.8—*

"As used in Section 832.7, 'personnel records' means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

"(a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

"(b) Medical history.

"(c) Election of employee benefits.

"(d) Employee advancement, appraisal, or discipline.

"(e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

"(f) Any other information the disclosure of which would (continued...)

1043 through 1045.[45] (*City of Santa Cruz v. Municipal*

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[44] (...continued)
constitute an unwarranted invasion of personal privacy."

[45] At all relevant times, these statutes have provided:

*Section 1043*—

"(a) In any case in which discovery or disclosure is sought of peace officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

"(b) The motion shall include all of the following:

"(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

"(2) A description of the type of records or information sought.

(continued...)

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[45] (...continued)

"(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

"(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records."

*Section 1044—*

"Nothing in this article shall be construed to affect the right of access to records of medical or psychological history where such access would otherwise be available under Section 996 or 1016."

*Section 1045—*

"(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of such investigations, concerning an event or transaction in which the peace officer participated, or which he perceived, and pertaining to the manner in which he performed his duties, provided that such information is relevant to the subject matter involved in the pending litigation.

"(b) In determining relevance the court shall examine the information in chambers in conformity with Section 915, and shall

(continued...)

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[45] (...continued)
exclude from disclosure:

"(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction which is the subject of the litigation in aid of which discovery or disclosure is sought.

"(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

"(3) Facts sought to be disclosed which are so remote as to make disclosure of little or no practical benefit.

"(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

"(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

"(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace officer records requested pursuant to Section 1043, ordered that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to
(continued...)

*Court, supra,* 49 Cal.3d at p. 81.) The California Supreme Court has stated:

> As statutory schemes go the foregoing is a veritable model of clarity and balance. Section 1043 clearly requires a showing of 'good cause' for discovery in two general categories: (1) the 'materiality' of the information or records sought to the 'subject matter involved in the pending litigation,' and (2) a 'reasonable belief' that the governmental agency has the 'type' of information or records sought to be disclosed. (§ 1043, subd. (b).)
>
> "The relatively low threshold for discovery embodied in section 1043 is offset, in turn, by section 1045's protective provisions which: (1) explicitly 'exclude from disclosure' certain enumerated categories of information (§ 1045, subd. (b)); (2) establish a procedure for in camera inspection by the court prior to any disclosure (§ 1045, subd. (b)); and (3) issue a forceful directive to the courts to consider the privacy interests of the officers whose records are sought and take whatever steps 'justice requires' to protect the officers from 'unnecessary annoyance, embarrassment or oppression.' (§ 1045, subds. (e), (d) (e).)
>
> "The statutory scheme thus carefully balances two directly conflicting interests: the peace officer's

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[45] (...continued)
applicable law."

> just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense. The relatively relaxed standards for a showing of good cause under section 1043, subdivision (b) ... insure the production for inspection of all potentially relevant documents. The in camera review procedure and disclosure guidelines set forth in section 1045 guarantee, in turn, a balancing of the officer's privacy interests against the defendant's need for disclosure. As a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead ... that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question. [Citations.]" (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at pp. 83-84.)

The right to appellate review of a motion to discover peace officer personnel records is limited to a determination of whether the trial court's ruling was correct. (*Herrera v. Superior Court* (1985) 172 Cal App.3d 1159, 1163.) In this regard, "[a] trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard. [Citation.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221; see also *People v. Breaux* (1991) 1 Cal.4th 281, 311.) Trial courts are granted "wide discretion" when ruling on such a motion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

Here, pursuant to stipulation, the CHP disclosed to appellant the information ordered disclosed in Jeremy's case—the names, addresses, and telephone numbers of the complaining and percipient witnesses identified in six specified complaints. There is nothing in the record before us to suggest that appellant was unable to contact these people or to learn from them the substance of their particular complaint or Maxwell's alleged conduct in that regard. (See *City of Azusa v. Superior Court* (1987) 191 Cal.App.3d 693, 696-697 [production of more than names and addresses premature where no showing complainants were unavailable for interviews or could not remember details of events about which they had complained].)

Not disclosed were the results of the investigations, to which appellant was entitled under *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47. In that case, the juvenile court ordered the disclosure of 11 complaints and the results of the investigations. The court made it clear that what was to be disclosed was not the conclusions of individual investigating officers, but the final result of each complaint, i.e., whether the investigating body found the complaint to have been founded or unfounded. (*Id.* at
p. 50.)

The California Supreme Court affirmed, holding that "discipline imposed" (which may be disclosed; see § 1045, subd. (a)) is a concept which is distinct from "conclusions of any officer investigating a complaint" (which may not be disclosed; see § 1045, subd. (b)). (*City of San Jose v. Superior Court, supra,* 5 Cal.4th at p. 55.) The Supreme Court determined:

> "The term 'conclusions of any officer' denotes the thought processes of, and factual inferences and deductions drawn by, an officer investigating a complaint, concerning such matters as the credibility of witnesses or the significance, strength, or lack of evidence. We see no indication that the Legislature intended the term to include the investigating body's ruling on the complaint or the nature of any discipline imposed. As Minor correctly asserts, the statutory scheme reveals a legislative intent to allow disclosure of the outcome of an investigation, i.e., the discipline imposed, without also requiring disclosure of how or why the investigating body reached that outcome." (*Ibid.*)

The court further noted that, pursuant to Penal Code section 832.7, subdivision (c), the department can disclose the results of the investigation to the complainant, who is not obligated to keep them confidential. (*City of San Jose v. Superior Court, supra,* Cal.4th at p. 57.)

Our review of Maxwell's personnel records reveals that in each instance except one (in which no complaint was filed, the citizen's concern being handled merely as an inquiry), the CHP informed the complaining party, either in writing or (in one instance) verbally, of the results of the investigation—i.e., whether Maxwell's conduct was or was not inappropriate, or whether no finding could be made. There is nothing in the record to suggest appellant was unable to learn the results of the various complaints from the complainants. If a complaint was sustained, the letter to the complainant recited that corrective or appropriate action was being taken. While this was insufficient to inform appellant of the nature of the discipline imposed, if any, appellant stipulated to the disclosure that was forthcoming. He cannot now predicate a claim of *Pitchess* error based on anything that remained undisclosed.

### *b. Brady*

Appellant goes beyond *Pitchess* and contends that federal constitutional error occurred in conjunction with disclosure of Maxwell's personnel records.

Preliminarily, we note that respondent dismisses the *Brady* argument by asserting at "the procedures contained in Evidence Code section 1043 are the sole means of discovering confidential material contained in a peace officer's personnel records," and pointing out that *Brady* was decided long before the relevant statutes were enacted. Respondent further argues that "[to follow appellant's analysis would require prosecutors to obtain and reveal confidential police records to criminal defendants in every case where such records may be exculpatory, without any defense showing of good cause and without resort to any in camera review," thereby effectively nullifying section 1043.

Appellant's constitutional argument cannot be rejected so easily. It is axiomatic that a state statute cannot override the federal Constitution. (See *Reynolds v. Sims* (1964) 377 U.S. 533, 566.) As the California Supreme Court has explained, "The prosecutor's duties of disclosure under the due process clause are *wholly independent* of any statutory scheme .... The due process requirements are self-executing and need no statutory support to be effective.... Furthermore, if a statutory discovery scheme exists, these due process requirements operate outside such a scheme.... [¶] *No statute can limit the foregoing due process rights of criminal defendants* ...." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378, italics added [discussing constitutionality of reciprocal discovery scheme contained in Pen. Code, § 1054 et seq.].)

Nor do we foresee the destruction of "section 1043 and the well-designed balancing of privacy interests and a defendant's due process rights which occurs when the neutral court performs its in camera review," as predicted by respondent. First, it would appear that, to the extent information contained in a peace officer's personnel file is exculpatory, this fact would constitute good cause for disclosure. Under such circumstances, a defendant's constitutional right to a fair trial, which is guaranteed to him or her by the due process clause of the Fifth Amendment to the United States Constitution (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685), outweighs a peace officer's or law enforcement agency's interest in the confidentiality of personnel records (see *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57-58; *People v. Memro, supra,* 38 Cal.3d at p. 688).

Moreover, as the California Supreme Court has recognized,

> "the due process clause requires the 'government' to give the accused all 'material' exculpatory evidence 'in its possession,' even where the evidence is otherwise subject to a state privacy privilege, at least where no clear state policy of 'absolute' confidentiality exists. (*Ritchie, supra,* 480 U.S. at pp. 56-58 [ ].)[[46]] When the state seeks to protect such privileged items from disclosure, the court must examine them in camera to determine whether they are 'material' to guilt or innocence. (*Id.*, at pp. 57-61 [ ].) In *Ritchie, supra,* the high court held that a complete in camera review of confidential records generated by a state agency as part of a molestation investigation was required where the defendant claimed they might undercut the complaining witness's credibility and where state law did not bar their disclosure under all circumstances. (*Id,* at p. 61 [ ].)" (*People v. Webb* (1993) 6 Cal.4th 494, 518.)

Thus, application of *Brady* does not sound a death-knell for in camera review and a balancing of interests. (See *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1501 [prosecutor appropriately submitted *Brady* issue to trial judge, thereby satisfying duty to disclose exculpatory material]; *U.S. v. Jones* (9th Cir. 1979) 612 F.2d 453, 456 ["*In camera* inspection and excision is a sound approach to a *Brady* inquiry."].)

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[46] Sections 1043 and 1045 clearly do not evince a state policy of absolute confidentiality, as they permit disclosure under certain circumstances.

We turn now to the merits of appellant's claim of constitutional error. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." (*California v. Trombetta* (1984) 467 U.S. 479, 485.) Thus, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Accordingly, "[t]he prosecution has a due process duty under the Fourteenth Amendment to the United States Constitution to disclose evidence to a defendant. [Citation.] But such evidence must be both 'favorable' to the defendant and "'material"' to either guilt or penalty. [Citation.].)" (*People v. Osband* (1996) 13 Cal.4th 622, 665; see *Brady v. Maryland, supra,* 373 U.S. at p. 87 ["[T]he suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."].)

"Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citation.]" (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) "'[F]avorable evidence is material, and constitutional error results from its suppression ..., "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."'" (*People v. Osband; supra,* 13 Cal.4th at p. 665, quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 433; see *United States v. Bagley* (1985) 473 U.S. 667, 682.)

> “”The requisite ‘reasonable probability’ is a probability sufficient to ‘undermine[ ] confidence in the outcome’ on the part of the reviewing court. [Citations.] It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.] Further, it is a probability that is, as it were, ‘objective,’ based on an ‘assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision,’ and not dependent on the ‘idiosyncrasies of the particular decision maker,’ including the ‘possibility of arbitrariness, whimsy, caprice, “nullification,” and the like.’ [Citation.]” (*In re Sassounian, supra, 9* Cal.4th at pp. 544-545, fn. omitted.)

“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish “materiality” in the constitutional sense.”’ (*People v. Fauber* (1992) 2 Cal.4th 792, 829, quoting *United States v. Agurs* (1976) 427 U.S. 97, 109-110.) As the California Supreme Court recently explained,

> “The current standard of review for *Brady* materiality was first articulated in *Bagley, supra,* 473 U.S. 667, although the United States Supreme Court began developing it in earlier decisions. (See *Agurs, supra,* 427 U.S. at p. 112; *Giglio v. United States* [(1972)] 405 U.S. [150,] 154.)

Recently in *Kyles, supra,* 514 U.S. 419, the court reemphasized four aspects articulated in *Bagley* critical to proper analysis of *Brady* error. First, '[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). [Citations.] *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' (*Id.* at p. 434.)

"Second, 'it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the

> whole case in such a different light as to undermine confidence in the verdict.' (*Kyles, supra,* 514 U.S. at pp. 434-435, fn. omitted.)
>
> "Third, 'once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review.' (*Kyles, supra,* 514 U.S. at p. 435.) The one subsumes the other. (*Id.* at pp.435-436.)
>
> "Fourth, while the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes of materiality must be considered collectively. (*Id.* at pp. 436-437 fn. 10; see also *Agurs, supra,* 427 U.S. at p. 112, fn. omitted [omission 'must be evaluated in the context of the entire record'].)" (*In re Brown* (1998) 17 Cal.4th 873, 886-887, parallel citations omitted.)

Appellant was clearly entitled to discover certain of the complaints contained in Maxwell's personnel file. "'It has long been recognized that where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible.' [Citations.] Under Evidence Code section 1103, such character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence. [Citation.]" (*People v. Wright* (1985) 39 Cal.3d 576, 587.) Moreover, habit or custom evidence—which often is established by evidence of repeated instances of similar conduct—is admissible to show that a person acted in conformity with that habit or custom on a given occasion. (*People v. Memro, supra,* 38 Cal.3d at p. 681; § 1105.) Thus, specific acts of aggression by an alleged victim may be admissible to show the victim was the aggressor on a particular occasion, and such evidence is material when the defense is self-defense or where the defendant seeks to show mitigating circumstances to reduce the charge. (*Angstrom v. Superior Court* (1971) 20 Cal.App.3d 240, 245, disapproved on other grounds in *Hill v. Superior Court* (1974) 10 Cal.3d 812, 820.) Evidence that an officer used excessive force against third parties on other occasions is highly probative on the issue of whether the officer had a propensity to use excessive force against citizens he or she arrested or detained and, by inference, whether he or she acted in character in the confrontation with the defendant. (*People v. Castain* (1981) 122 Cal.App.3d 138, 143.) Such evidence also tends to show a pattern of behavior reflecting a character trait of violence. (*Ibid.*)[47]

Given the foregoing, complaints contained in Maxwell's personnel file concerning allegations of verbal aggressiveness toward, or use of excessive force against, citizens were discoverable pursuant to *Brady* and its progeny. Also discoverable was the fact that discipline was imposed. (See *Carruthers v. Municipal Court* (1980) 110 Cal.App.3d 439, 443.) As previously discussed, however, most of the information was indeed available to appellant. He either obtained it directly, as a result of the stipulation which resolved his *Pitchess* motion, or, insofar as the record shows, he was able to obtain it from the complainants themselves. "Since suppression by the Government is a necessary element of a *Brady* claim, [citation], if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails. [Citations.]" (*U.S. v. Dupuy, supra*,, 760 F.2d at p. 1501, fn. 5; see also *U.S. v. Morris* (7th Cir. 1996) 80 F.3d 1151, 1170 [no suppression if information available to defendant through exercise of reasonable diligence].) As for the nature of the discipline imposed, we find it was not material in the constitutional sense. It was the nature and propriety of Maxwell's conduct, not the nature of any discipline imposed, which was pertinent to appellant's defense. There is no reasonable probability—one sufficient to undermine confidence in the outcome—that, had the nature of the discipline imposed been disclosed, the result of the trial would have been different. Accordingly, no constitutional error resulted from any failure to disclose that information. (See *Kyles v. Whitley, supra*, 514 U.S. at p. 433; *People v. Osband, supra*, 13 Cal.4th at p. 665.)[48]

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[47] It is important to remember that even assuming evidence of prior misconduct might not be admissible at trial, "discovery is not limited to admissible evidence, but encompasses information which may lead to relevant evidence." (*Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 828.)

### 2. Annex A

We next turn to Annex A. In pertinent part, it contained a summary of sustained complaints; a summary of incident reports, both favorable and unfavorable; a summary of performance appraisals, one of which might best be described as the evaluator's conclusion, based on citizens' complaints, that Maxwell had developed a particular propensity; and information concerning Maxwell's knowledge of appellant.

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[48] Even without knowing the exact nature of the discipline imposed, appellant could have presented to the jury the fact that Maxwell incurred a sustained complaint even after being disciplined.

### a. *Pitchess*

As a preliminary matter, it is not clear whether Annex A was part of Maxwell's personnel file. In its response to appellant's December 9, 1994, motion for disclosure of the shooting report, the CHP indicated that only parts of the report were kept in Maxwell's personnel records. The August 21, 1994, memorandum of findings is the only portion of the shooting report which recites that it was being placed in Maxwell's personnel folder. To the extent Annex A does not constitute a personnel record, or does not contain information from such records or from citizens' complaints which are maintained pursuant to Penal Code section 832.5, disclosure of the information contained therein is not governed by *Pitchess* or section 1043. (See § 1043, subd. (a).) However, the CHP claimed the privilege for official information as to the entire shooting report.[49]

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[49] The privilege for official information is contained in section 1040, which states in pertinent part:

"(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to (continued...)

The portion of Annex A at issue here which does not appear to come from Maxwell's personnel file, concerns Maxwell's knowledge of appellant.[50] We need not determine whether disclosure was forbidden under section 1040 (or, assuming Annex A or this information was part of Maxwell's

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[49] (...continued)
the public prior to the time the claim of privilege is made.

"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

"(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

"(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

As respondent does not advance claims of attorney-client or work product privileges on appeal, we do not decide whether those privileges applied.

[50] Annex A does not reveal the source of this information, and it does not appear to be the type of item that would be kept in a peace officer's personnel records.

personnel file, under § 1043) since the information was also contained in chapter III (the investigative summary) of the shooting report. Chapter III was ultimately ordered disclosed to the defense.

The summaries of citizens' complaints, discipline, and performance appraisals contained in Annex A obviously were garnered from Maxwell's personnel records. Accordingly, insofar as state law is concerned, their disclosure is governed by section 1043 and related statutes. We have dealt with the citizen complaints and discipline imposed, *ante*. Our analysis does not change simply because those items are contained in Annex A as opposed to coming directly from Maxwell's personnel records. (See § 1043, subd. (a).)

With respect to the performance appraisals — specifically the evaluator's opinion, based on citizens' complaints, concerning a particular alleged propensity — this information constitutes "personnel records" for purposes of the pertinent code sections. (Pen. Code, § 832.8, subds. (d), (e).) Personnel records and records of citizens' complaints, together with information obtained therefrom, may not be disclosed except pursuant to sections 1043 and 1046. (Pen. Code, § 832.7, subd. (a); *Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 98.) Section 1045, subdivision (b)(2), exempts from disclosure the conclusions of any officer investigating a citizen's complaint. Assuming the propensity opinion does not fall within that category, nevertheless we cannot say the trial court abused its discretion in denying disclosure where appellant had access, through the complainants, to the conduct which gave rise to the opinion.

(See *People v. Samayoa, supra,* 15 Cal.4th at p. 827; *People v. Jackson, supra,* 13 Cal.4th at pp. 1220-1221.)

### *b. Brady*

We have previously discussed appellant's claims of *Brady* error with regard to the contents of Maxwell's personnel records. Our analysis, and our conclusion that there was no error under the federal Constitution, remain the same with regard to the discipline and complaint information contained in Annex A. With regard to information concerning Maxwell's prior knowledge of appellant, as we have noted, that information was contained in Chapter III of the shooting report and was disclosed. As we have also noted, a *Brady* claim must fail where the means of obtaining the evidence has been provided to the defense. (*U.S. v. Dupuy, supra,* 760 F.2d at p. 1501, fn. 5.) Since appellant had this information, he cannot claim *Brady* error simply because the same information was not disclosed through Annex A.

This leaves us with the summary of Maxwell's performance appraisals, which contained the evaluator's propensity opinion. Significantly, this opinion was based upon citizens' complaints. As we have already explained, appellant had the means of learning of Maxwell's conduct from those complainants themselves.

As an initial matter, we reject appellant's insistence that the district attorney's office had actual access to this information, and therefore that the prosecutor committed misconduct during argument to the jury.[51] Judge Gildner's ruling on the *Pitchess* motion ordered the complainant information released to defense counsel as well as to the district attorney, and the prosecutor neither represented the CHP during hearings on, nor took a position concerning, appellant's various requests for the shooting report and information from Maxwell's personnel files. The clear import of the state of the record is that the prosecutor did not have access to Annex A, or to the performance appraisals which were summarized therein.

Relying on Penal Code section 832.5, subdivision (a) and *Michael v. Gates, supra,* 38 Cal.App.4th 737, appellant asserts that the district attorney's's office had access to these materials as a matter of law. We disagree. Penal Code section 832.5, subdivision (a) simply states:

> "(a) Each department or agency in this state which employs peace officers shall establish a

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[51] In his summation, the prosecutor described Maxwell as "a quiet man" and "a quiet, nice guy who did his job in a professional manner." He also contrasted the demeanors of appellant and Maxwell, and argued that appellant was the aggressor. In response to the defense's contention that Maxwell used excessive force and that appellant had the right to use deadly force to defend himself and his family, the prosecutor stated: "Was there any evidence whatsoever that Officer Maxwell had any type of character flaw or lapse of judgment in his professional career, because obviously, we could have heard about that if there were. [¶] And I can answer that. There was not. None whatsoever. And an officer doesn't suddenly one day in 1994 after being a Highway Patrol officer for five years suddenly lapse into unreasonableness."

> procedure to investigate citizens' complaints against the personnel of such departments or agencies, and shall make a written description of the procedure available to the public."

This statute patently does not grant anyone access to peace officer personnel records themselves.

Appellant likely meant to cite Penal Code section 832.7, subdivision (a), which exempts from confidentiality and from the procedural requirements of sections 1043 and 1046 "investigations or proceedings concerning the conduct of police officers ... conducted by ... a district attorney's office, or the Attorney General's office." However, not all peace officers are police officers, and while CHP officers are accorded peace officer status (Pen. Code, § 830.2, subd. (a)), we find nothing to suggest they are also *police* officers.

> "The plain language of Penal Code section 832.7, subdivision (a) makes a crucial distinction between '*peace* officers' and '*police* officers.' The broad category of peace officers is defined in Penal Code section 830 et seq. Among the many persons accorded peace officer status are police officers and sheriffs (Pen. Code, § 830.1, subd. (a)), members of the California Highway Patrol (Pen. Code, § 8302, subd. (a)), and fire department arson investigators (Pen. Code, § 830.37, subd. (a)). These Penal Code provisions make clear that while a police officer has peace officer status, not all peace officers are also police officers. The terms 'police officer' and 'peace

officer' are therefore not interchangeable in statutory interpretation.

> "The scope of the district attorney's exemption from Penal Code section 832.7, subdivision (a)'s confidentiality provisions is limited to the district attorney's investigations of *police* officer ... conduct. Nonpolice peace officers' personnel records are protected from the district attorney's investigation, and cannot be disclosed in a criminal or civil proceeding unless the district attorney obtains a discovery order in compliance with Evidence Code sections 1043 and 1046." (*People v. Superior Court* (*Gremminger*) (1997) 58 Cal.App.4th 397, 404-05, original italics; see also 66 Ops. Cal.Atty.Gen. 128 (1983) [district attorney who is investigating conduct of police officer need not first obtain court order for access to officer's personnel records].)

*Michael v. Gates, supra,* 38 Cal.App.4th 737, likewise does not assist appellant. That case involved a situation in which the governmental agency reviewed its own records with its attorney. The appellate court concluded that "where ... a governmental agency and its attorney conduct a contained and limited review of peace officer personnel files within the custody and control of the agency, for some relevant purpose, there is no disclosure under the statutes." (*Id.* at p. 745.) *Michael is* thus factually and legally dissimilar from appellant's case. There has been absolutely no showing that Maxwell's personnel files were within the actual custody and control of the district attorney's office, or that the district attorney was acting as the CHP's lawyer.

A prosecutor does not commit misconduct by commenting on a defendant's failure to introduce logical evidence or to call logical witnesses (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215-1216.) Here, the prosecutor did not commit misconduct by pointing out the defense's failure to produce evidence concerning Maxwell's demeanor and conduct. Regardless of whether knowledge of the contents of Annex A might be imputed to the prosecutor for *Brady* purposes (discussed post), we will not ascribe misconduct (in the standard sense of the term) to the prosecutor based on his argument to the jury.

> "Pursuant to *Brady, supra,* 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (*Id.* at p. 87), a general request, or none at all (*United States v. Agurs* (1976) 427 U.S. 97, 107 (*Agurs*)). The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf ....' (*Kyles, supra, 514* U.S. at p. 437.) Courts have thus consistently 'decline[d] "to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel."' (*United States v. Auten* (5th Cir. 1980) 632 F.2d 478, 481.) 'A contrary holding would enable the prosecutor "to

avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial," [citation].' (*Martinez v. Wainwright* [(5th Cir. 1980)] 621 F.2d [184,] 188; *United States* ex rel. *Smith v. Fairman* (7th Cir. 1985) 769 F.2d 386, 391-392.) Thus, 'whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government.' (*Giglio v. United States* (1972) 405 U.S. 150, 154; *Kyles, supra,* 514 U.S. at p. 439.)

"As a concomitant of this duty, any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. 'The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation.' (*U.S. v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1208 (*Payne*); see *Smith v. Secretary Dept. of Corrections* [(10th Cir. 1995)] 50 F.3d [801,] 824-825, and cases cited therein.) The Supreme Court recently reiterated this principle: 'whether the prosecutor succeeds or fails in meeting this obligation [to learn of favorable evidence] (whether, that is, a failure to disclose is in good faith or bad faith, [citation]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.' (*Kyles, supra,* 514 U.S. at pp. 437-438; see also *Giglio v. United States, supra,* 405 U.S. at p.

> 154.)" (*In re Brown, supra,* 17 Cal.4th at pp. 879-880, parallel citations & fns. omitted.)

Here, portions of the shooting report indicate that, although the Kern County Sheriff's Office and District Attorney's Office were primarily responsible for the criminal investigation, information was shared among the various agencies. Under the circumstances of this case, the prosecutor generally would be presumed to have knowledge of information possessed by the CHP. For example, in *U.S. v. Deutsch* (5th Cir. 1973) 475 F.2d 55, 57 (overruled on other grounds in *US. v. Henry* (5th Cir. 1984) 749 F.2d 203, 206, fn. 2), the court observed that there is no suggestion in *Brady* that different arms of the government are severable entities. In *Deutsch,* both entities (the Department of Justice and the Post Office) were part of the federal government and, because one arm prosecuted an offense affecting an employee of the other arm, they were closely connected for purposes of the case.

Even if we assume that the district attorney's office and CHP are entities of different governments (the county and the state), the result is the same. In *U.S. v. Antone* (5th Cir. 1979) 603 F.2d 566, 569-570, the court held that the focus is on the "prosecutorial team," which includes both investigative and prosecutorial personnel. Where state and federal forces have pooled their investigative energies, a court must analyze, on a case-by-case basis, the extent of the interaction and cooperation between the two. Where extensive cooperation exists so that state investigators functioned as agents of the federal government, the knowledge of those investigators is imputed to federal prosecutors. Such a situation is analogous to that which exists in the present case.

There is, however, an additional wrinkle to this case: as previously discussed, the district attorney's office had no more access to information contained in, or obtained from, Maxwell's personnel records than did appellant. The scope of the prosecutorial duty to disclose has long been held to encompass "not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies *to which the prosecutor has reasonable access.* [Citation.]" (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380, italics added; *People v. Robinson* (1995) 31 Cal.App.4th 494, 499.) As the California Supreme Court has stated:

> "California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include information 'within the possession or control' of the prosecution. (See *Hill v. Superior Court* (1974) 10 Cal.3d 812, 816.) In *Pitchess v. Superior Court, supra,* 11 Cal.3d 531, 535, we construed the scope of possession and control as encompassing information 'reasonably accessible' to the prosecution. In *Engstrom v. Superior Court* (1971) 20 Cal.App.3d 240, 243 (disapproved on other grounds in *Hill v. Superior Court, supra,* 10 Cal.3d at p. 820), the court held that materials discoverable by the defense include information in the possession of all agencies (to which the prosecution has access) that are part of the criminal justice system, and not solely

information 'in the hands of the prosecutor.' (20 Cal.App.3d at p. 244.) In *People v. Coyer* (1983) 142 Cal.App.3d 839, 843, the court described information subject to disclosure by the prosecution as that 'readily available' to the prosecution and not accessible to the defense." (*In re Littlefield* (1993) 5 Cal.4th 122, 135, parallel citations omitted; see also *U.S. v. Bryan* (9th Cir. 1989) 868 F.2d 1032, 1036 [information is "in the possession of the government" if the prosecutor "has knowledge of and access to the documents sought by the defendant"].)

In *Kyles v. Whitley, supra,* 514 U.S. at page 437, the United States Supreme Court stated that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." It is unclear whether, under the circumstances of this case, information obtained from Maxwell's personnel records is considered accessible to, or within the custody or control of, the prosecution for purposes of its duty to disclose. We need not resolve this dilemma, however, because we conclude appellant's claim of *Brady* error must fail for another reason: the propensity information was not "material" in the constitutional sense.

The legal principles which govern a materiality determination are set out *ante.* (See *Kyles v. Whitley, supra,* 514 U.S. at pp. 434-437; *In re Brown, supra,* 17 Cal.4th at pp. 886-887.) "[T]he duty to disclose is ongoing; information that may be deemed immaterial upon original [in camera] examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial." (*Pennsylvania v. Ritchie, supra,* 480 U.S. at p. 60.) Thus, if the propensity information became material at some point in the trial (for example, during Young's testimony), the fact it may not have been material when the trial court first examined the shooting report in camera does not excuse its nondisclosure.

In assessing the materiality of the propensity information, we again note that appellant had access to the conduct which gave rise to the complaints upon which the evaluator's propensity opinion was based in the first place. Appellant was free to call as witnesses those who filed complaints against Maxwell, to place their reports of Maxwell's conduct before Young, and to ask whether an officer engaged in such conduct would have been following CHP policy.[52] Appellant then could have argued to the jury that Maxwell had precisely the propensity referenced in Annex A; that such conduct rose to the level of habit or custom; and that during his encounter with appellant, Maxwell acted in conformity with that habit or custom.

What appellant could not do, even assuming the propensity information contained in Annex A had been disclosed to him, was ask Young directly about the evaluator's opinion.

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[52] Our analysis applies equally to other experts, such as Fincel and, to the extent his conclusions may have been undercut if Maxwell was not acting in conformity with CHP policy, Laskowski. Moreover, our analysis holds true even assuming Young had access to Annex A.

> "An expert may be cross-examined regarding the subject to which his testimony relates, the matter on which he bases his opinion, and the reasons for his opinion. (Evid. Code, § 721, subd. (a).) Therefore, a party seeking to attack the credibility of the expert may bring to the attention of the jury material relevant to the issue on which the expert has offered an opinion of which the expert was unaware or which he did not consider. The purpose and permissible scope of impeachment of an expert is to call into question the truthfulness of the witness's testimony. Impeachment is not general rebuttal. [Citation.]" (*People v. Bell* (1989) 49 Cal.3d 502, 532.)

If the propensity information contained in Annex A was simply an indication that was contained in Maxwell's performance appraisal and which was based upon citizens' complaints, the conclusion added nothing to cross-examination of Young, since appellant could have asked him directly about the conduct which gave rise to those complaints. If, as it appears, the information consisted of the performance evaluator's conclusion or opinion, "[a]n expert's testimony must be based on matters upon which he may reasonably rely. (Evid. Code, § 801.)"[53] (*Smith v. AC and S,*

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[53] Section 801 provides:

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

"(a) Related to a subject that is sufficiently beyond (continued...)

*Inc.* (1994) 31 Cal.App.4th 77, 93.) "The determination whether matter is of the kind that reasonably may be relied upon by an expert depends on the facts of the case including the matter's reliability." (*People v. Parnell* (1993) 16 Cal.App.4th 862, 869; see 1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 476, p. 447.) The propensity information simply is not the kind of information upon which an expert reasonably may rely. While an expert is not necessarily precluded from basing his or her opinion on the opinion or statement of another (see § 804, subd. (a)), there is absolutely no suggestion that the evaluator qualified as an expert in propensity; moreover, assuming expertise, the information was based upon citizens' complaints. As stated, appellant had access to the conduct giving rise to those complaints and could have cross-examined Young directly on that conduct. The propensity conclusion added nothing. Thus, Young's knowledge of that conclusion in Annex A was not relevant to the opinions he rendered. (See *People v. Bell, supra,* 49 Cal.3d at p. 532.)

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[53] (...continued)
common experience that the opinion of an expert would assist the trier of fact; and

"(b) Based on matter (including his own special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

We now turn to the question whether disclosure of the propensity information in Annex A might have led to the discovery of evidence. (See *People v. Clark* (1992) 3 Cal.4th 41, 133; *People v. Memro, supra,* 38 Cal.3d at p. 677.) We assume, for the sake of argument, that disclosure would have led appellant to the person who evaluated Maxwell's performance and formed the opinion concerning Maxwell's propensity. We further assume that appellant would have wanted to call this person as a witness in order to testify to his or her opinion.

First, it is exceedingly doubtful this person would have qualified as an expert on the subject of propensity, which can involve a person's psychological or mental state. We recognize that, depending on the circumstances, a qualified lay witness can give an opinion as to mental condition. (See, e.g., *People v. DeSantis* (1992) 2 Cal.4th 1198, 1228.) However, "[w]itnesses must ordinarily testify to facts, leaving the drawing of inferences or conclusions to the jury or court." (*Froomer v. Drollinger* (1962) 201 Cal.App.2d 90, 98.) To this end, section 800 provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

"The meaning of subdivision (a) is clear: "A witness who is not testifying as an expert may testify in the form of an opinion *only if the opinion is based on his own perception.*' [Citations, original italics.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306.) "Perception" is defined "as the process of acquiring knowledge 'through one's senses' [citation], i.e., by personal observation." *(Ibid.,* fn. omitted.) Thus, a lay witness may give opinion evidence from personal observation, but not on facts related by other parties. (*Stuart v. Dotts* (1949) 89 Cal App.2d 683, 686-687.)

Here, the opinion concerning Maxwell's propensity was, as related by Annex A, based on citizens' complaints, not on the personal observations of the evaluator. Accordingly, if the evaluator were to testify as a nonexpert, he or she could not testify to such an opinion. (See, e.g., *Stickel v. San Diego Elec. Ry. Co.* (1948) 32 Cal.2d 157, 165 [investigating officer's notation as to cause of accident inadmissible where notation was opinion of officer arrived at after he interviewed persons at scene of accident].)

Even assuming the evaluator could qualify as an expert, the propensity opinion was not based on Maxwell's psychological make-up, but on the citizens' complaints. Pursuant to section 801, subdivision (a), an expert may testify to his or her opinion only if such opinion is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact[.]"

It is highly questionable whether Maxwell's "propensity," based on the citizens' complaints, was a proper subject for expert opinion. "'[T]he admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission .... Instead, ... expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness."' [Citation.]" (*People v. McAlpin, supra,* 53 Cal.3d at pp. 1299-1300; 1 Witkin, Cal. Evidence, *supra,* The Opinion Rule, § 475, p. 447.) In short, "[e]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) Such is the situation here: the jury is as capable as an expert of examining Maxwell's conduct, as shown in the citizens' complaints, and determining whether, based on that conduct, he had developed a particular propensity. (See, e.g., *People v. Johnson* (1993) 19 Cal.App.4th 778, 785 [proposition that inmates lie not outside jurors' common understanding & jury did not need expert testimony to assist it in ascertaining relevant facts]; *People v. Czahara* (1988) 203 Cal.App.3d 1468, 1478 [adequacy of provocation for heat of passion not subject sufficiently beyond common experience that expert opinion would assist trier of fact].)[54]

It is possible the evaluator might have qualified as an expert on officers' conduct. However, appellant had access to Maxwell's conduct and was not precluded from questioning Young (who was himself an expert, at least on conduct as it concerned use of force) about it or from bringing in his own expert on the subject. Similarly, to the extent the opinion might have led to habit and custom evidence, such evidence consisted of the conduct itself.

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[54] We reiterate that Annex A recited at the propensity opinion was based on the citizens' complaints, not on Maxwell's psychological makeup.

To summarize, the contents of Annex A were not material in the constitutional sense. Accordingly, assuming suppression occurred, no constitutional error resulted because there is no reasonable probability that, had the evidence been disclosed to appellant, the result of the proceeding would have been different. (See *People v. Osband, supra,* 13 Cal.4th at p. 665; *Kyles v. Whitley, supra,* 514 U.S. at p. 433.)[55]

## II.

## Change of Venue

Appellant contends the trial court erred by denying his motion for change of venue. He says the motion should have been granted due to the extensive publicity engendered by this case.

### A. Procedural History

Appellant moved, pretrial, for a change of venue based on prejudicial pretrial publicity. In support, he presented various newspaper articles and a videotape of television coverage concerning the case. At the hearing on the motion, the results of a county-wide survey of 310 people were also presented. Just over 86 percent of the people surveyed had heard of the case; of those, 44.8 percent had formed the opinion that appellant was guilty and 7.1 percent believed he was probably guilty. Many of the people could recall details of the case, such as Maxwell's name, marital status, employing agency, and that there were other charges pending against appellant. Of the people sampled, 36 (11.6 percent) had not heard about the case even after they were given information about it, while 33.5 percent of those who had heard of the case had not formed an opinion.[56] Thus, of the 310 people sampled, 140 people (45 percent of the sample) had not heard of the case or had not formed an opinion. At the time of the hearing, the population of Kern County was close to 600,000.[57] If the survey was accurate and statements about not forming an opinion were accepted, this left an untainted jury pool (taking into account only those who were over 18 years old and were registered to vote or who had a driver's license) of 100,000 to 200,000 people.

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[55] Since we find no cause for reversal, we do not reach appellant's request that we remand for a determination whether a sanction greater than reversal (such as dismissal) is required. (See *U.S. v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1325.)

Following argument, the trial court denied the motion without prejudice, finding no showing that there was a reasonable likelihood a fair and impartial trial could not be held in Kern County. The court noted that a very serious crime was involved, but found that factor not to be dispositive. With regard to population figures and the survey, the court found it significant that 45.1 percent polled indicated that either they had not heard of the case or had not formed an opinion. The court found that, by means of individual voir dire and the use of jury questionnaires, it could be determined whether those who had formed an opinion could set it aside. Additionally, the court found that the majority of the media coverage "was straightforward, factual in reporting, not sensational and not inflammatory." The court noted that, following Maxwell's funeral, the reporting mainly concerned the procedural progress of the case. The court found that appellant was relatively unknown prior to this incident and that, while Maxwell was well-liked and respected among his peers, family, and friends, "he was not a prominent person as that term has been used in the other cases." The court observed that while Maxwell was a CHP officer, that was a state-wide organization, and the status of the victim being a CHP officer would have the same significance in any other county. Appellant unsuccessfully sought pretrial writ relief from the trial court's ruling.

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[56] Those surveyed were not asked whether, if they had formed an opinion, they would be able to set it aside and base their decision on the evidence produced in court.

[57] The People and appellant presented figures from the 1990 census of 543,477 and 543,981, respectively. In addition, appellant represented that it was estimated the population had increased by approximately 10,000 since the census.

Four panels of approximately 60 people each were called for trial. Prior to jury selection, each prospective juror was required to complete two questionnaires, both of which covered (among other subjects) knowledge of the case and whether the prospective juror had formed an opinion as to guilt or innocence. Group and individual voir dire were conducted. After excusals for cause and hardship, 89 prospective jurors remained. Appellant neither renewed his motion for change of venue nor exhausted his peremptory challenges.[58]

### B. Discussion

Appellant's failure to renew his motion, when it was expressly denied without prejudice to being renewed, could result in our finding waiver. (See *People v. Bolin* (1998) 18 Cal.4th 297, 312-313.) Nevertheless, we will address appellant's claim of error on its merits.

> "Pursuant to [Penal Code] section 1033, subdivision (a), the court must grant a motion for change of venue if there is a reasonable likelihood that a fair and impartial trial cannot be had in the county.' The phrase 'reasonable likelihood' in this context 'means something less than "more probable than not,"' and 'something more than merely "possible."' In ruling on such a motion, as to which defendant bears the burden of proof, the trial court considers as factors the gravity and nature of the crime, the extent and nature of the publicity, the size and nature of the community, the status of the victim, and the status of the accused.
>
> "'On appeal after a judgment following the denial of a change of venue, the defendant must show both that

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[58] This being a death penalty case, appellant was entitled to 20 peremptory challenges as to the actual jury. (Code Civ. Proc., § 231, subd. (a).) He exercised 17. There being four alternate jurors, appellant was entitled to four peremptory challenges as to the alternates. (Pen. Code, § 1089.) He exercised three.

> the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not *in fact* had.'
>
> "With regard to the first part of the showing required of a defendant on appeal, we employ a standard of de novo review of the trial court's ultimate determination of the reasonable likelihood of an unfair trial. This requires our independent determination of the weight of the five controlling factors described above. With regard to the second part of the showing, in order to determine whether pretrial publicity had a prejudicial effect on the jury, we also examine the voir dire of the jurors." (*People v. Proctor* (1992) 4 Cal.4th 499, 523-524, citations omitted.)

While we independently review the trial court's ultimate determination of the reasonable likelihood of an unfair trial, "[t]he trial court's essentially factual determinations such as the gravity of the crimes, the size of the community, the status of the defendant and victims, and the nature and extent of the pretrial publicity, will be sustained if supported by substantial evidence." (*People v. Cooper* (1991) 53 Cal.3d 771, 806.)

Where, as here, extensive publicity forms the basis for a claim of potential prejudice,

> "the ability to assure the defendant a fair trial, and the impact of prejudicial publicity, are measured by whether the defendant has "'a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd,* 366 U.S., at 722. Qualified jurors need not, however, be totally ignorant of the facts and issues involved. [¶] ... "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court " *Id.,* at 723. [¶] At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Ibid.* ' (*Murphy v. Florida* (1975) 421 U.S. 794, 799-800 [ ].)" (*People v. Bean* (1988) 46 Cal.3d 919, 941.)[59]

When denial of a change of venue is challenged pretrial by a petition for writ of mandate, "because the prejudicial effect of publicity ... is necessarily speculative, it is settled that "'any doubt as to the necessity of removal ... should be resolved in favor of a venue change."' [Citation.] After trial, any presumption in favor of a venue change is unnecessary, for the matter may then be analyzed in light of the voir dire of the actual, available jury pool and the actual jury panel selected." (*People v. Williams* (1989) 48 Cal.3d 1112, 1125.) Examination of actual voir dire is particularly useful where, as here, the trial court conducted individualized voir dire to determine whether pretrial publicity affected the accused's right to a fair trial (*People v. Hernandez* (1988) 47 Cal.3d 315, 336.)

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[59] Where the claim is that pretrial publicity so infected a trial as to deny the defendant his or her Sixth Amendment right to an impartial jury, "[t]he relevant question is ... whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant." (*Patton v. Yount* (1984) 467 U.S. 1025, 1035.)

We turn now to the five factors. We observe that in performing this analysis, we receive no help from appellate counsel, whose argument on the issue consists of two paragraphs of conclusory statements, no analysis, and no citations to the record. It is appellant's burden to establish error (see *People v. Proctor, supra,* 4 Cal.4th at p. 523), and a reviewing court is not required to scrutinize the record for the testimony or evidence upon which the appellant relies (*People v. Avena* (1996) 13 Cal.4th 394, 420).

### 1. The gravity and nature of the crime

The offense, the murder of a peace officer, "is of course one of extreme seriousness and gravity, so this factor weighs in favor of a change of venue. [Citations.]" (*People v. Daniels* (1991) 52 Cal.3d 815, 852.)

### 2. The size and nature of the community

In assessing this factor, the size of the county alone is not determinative; rather, "[t]he key is whether it can be shown that the population is of such a size that it 'neutralizes or dilutes the impact of adverse publicity.' [Citation.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 363.) The population of Kern County is of such a size; indeed, the California Supreme Court itself has noted that cases in which changes of venue are granted or ordered on review usually involve counties with much smaller populations. (*People v. Balderas* (1985) 41 Cal.3d 144, 178-179.) Population-wise, "Kern County is not a small community ...." (*People v. Martinez* (1978) 82 Cal App.3d 1, 14; see *People v. Daniels, supra,* 52 Cal.3d at p. 852 [factor neutral where county involved had population exceeding 600,000].) Moreover, we are impressed by the figures given by appellant's own expert surveyor as to the size of the potential "untainted" jury pool.

### 3. The status of the victim

"Although the victim was a well-liked police officer and his status was emphasized in the news coverage, he was not a prominent person in the community." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1276; see *People v. Daniels, supra,* 52 Cal.3d at p. 852 [police victims were local residents of no particular prominence, although they became posthumous celebrities as result of media coverage of murders].)

### 4. The status of the accused

Appellant was neither a stranger to the community nor "a person of particular notoriety or status." (*People v. Daniels, supra,* 52 Cal.3d at p. 852; *People v. Cummings, supra,* 4 Cal.4th at p. 1276.)

### 5. The extent and nature of the publicity

The trial court's finding that the media coverage of the case was mostly factual and not sensational or inflammatory, is supported by substantial evidence. Moreover, while publicity was extensive early on in the case, insofar as the record shows, the amount of media coverage was "relatively minimal at the time of jury selection and trial." (*People v. Cummings, supra,* 4 Cal.4th at p. 1276.) Juror questionnaires and voir dire showed that most prospective jurors had heard or read of the crime. "That fact, however, is not in itself sufficient to require a change of venue. [The California Supreme Court] explained in *People v. Harris* [(1981)] 28 Cal.3d 935, that "'juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone [does not] presumptively deprive[ ] the defendant of due process."' [Citations.] "'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."' [Citations.]" (*People v. Daniels, supra,* 52 Cal.3d at p. 853.)

Our review of the record satisfies us that this is what occurred in the present case, and that it is neither reasonably likely a fair trial could not be had at the time the motion was denied, nor is it reasonably likely appellant received an unfair trial. Appellant relies on *People v. Williams, supra,* 48 Cal.3d 1112, in which the defendant's conviction was reversed because of the trial court's erroneous denial of a change of venue based on pretrial publicity. Regardless of whether the news coverage here was comparable in extent to that in *Williams,* that case arose in a county of much smaller population — Placer County, which, at the time of trial, had a population of 117,000. (*People v. Williams, supra,* 48

Cal.3d at p. 1126.) In fact, two of the jurors actually seated in *Williams* were personally acquainted with the district attorney. (*Id.* at p. 1130.) More importantly, in this case, unlike in *Williams*, appellant did not exhaust his peremptory challenges.

Under the circumstances of this case, ''[t]his last factor is decisive." (*People v. Daniels, supra, 52* Cal.3d at p. 854; see also *People v. Dennis* (1998) 17 Cal.4th 468, 524.) Appellant's failure to exhaust his peremptory challenges or to object to the jury as finally composed constituted "a tacit acknowledgment that, regardless of community attitudes generally, the jury as finally selected was a fair and impartial body." (*Daniels, supra,* at p. 851.)

In light of the foregoing, we conclude the trial court did not err in denying appellant's motion for change of venue. (See *People v. Cummings, supra,* 4 Cal.4th at pp. 1276-1277 [motions properly denied based on factors similar to those in present case].)

## III.

## Joinder of Counts

Appellant contends the trial court committed reversible error by joining the automobile counts (counts 2 through 7) with the murder charge (count 1). In so arguing, he chides respondent for "miss[ing] the point entirely" by relying on cases involving a trial court's discretion to sever counts, and he expressly states that his challenge is to the joinder of counts in the first instance, "not to whether a trial court abused its discretion by refusing to sever counts that otherwise legally could be joined under [Penal Code] Section 954."

## A. Background

This case proceeded by way of grand jury indictment. The indictment, which was returned on August 10, 1994, contained both the murder and the automobile counts. Appellant was arraigned the same day, pleaded not guilty to all counts, and denied all special allegations.

On August 29, 1994, appellant filed a written motion to sever counts in which he contended that joinder of the automobile counts with the murder count was not permitted under Penal Code section 954 and that, even assuming proper joinder, severance should be ordered in the interests of justice. The People opposed the motion, asserting that the evidence in support of the automobile counts established a motive for the homicide and would therefore be admissible in the murder trial.

The motion was heard on September 7, 1994. Following argument (during which the prosecutor included, in his assessment of appellant's motive for killing a peace officer, appellant's anger over the seizure of property in connection with the automobile counts and his hatred toward the police), the court denied the motion, finding that the murder count was "reasonably connected" with the automobile counts "by a common thread of motive as perceived in the mind of the defendant." The court ruled that the offenses alleged in the automobile counts would be admissible in the trial of the murder count in order to establish motive for the killing, as appellant was aware of the ongoing investigation, was aware his arrest on the automobile charges was imminent, and was upset. The court found that the motive of avoiding arrest was circumstantial evidence of premeditation and deliberation, and that it was also relevant regarding the special circumstance of murder of a peace officer engaged in the performance of his or her duties.

## B. Analysis

Penal Code section 954 provides in pertinent part:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts .... The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged ...; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately...."[60]

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[60] An indictment constitutes an "accusatory pleading" for purposes of all relevant statutes. (Pen. Code, § 691, subd. (c)
(continued...)

As noted, appellant's challenge is to the initial joinder of counts. Although appellant argues that the trial court erred by joining the counts, this is not a case in which the trial court permitted consolidation of counts. Instead, the counts were joined in the initial charging document; the trial court had nothing to do with the joinder, which was a function of how the charges were brought by the prosecutor. An appellate court normally does not review a prosecutor's charging decision. (*People v. Mayfield* (1993) 5 Cal.4th 142, 188.) "Generally speaking, '[a] prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings.' [Citation.] Consequently as a matter of *pleading* the district attorney could allege what he chose ...." (*People v. Garcia* (1986) 183 Cal.App.3d 335, 344.)

In any event, Penal Code section 1004 provides: "The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof ... [¶] 3. That more than one offense is charged, except as provided in Section 954[.]" "When any of the objections mentioned in [Penal Code] Section 1004 appears on the face of the accusatory pleading, it can be taken only by demurrer, and failure so to take it shall be deemed a waiver thereof ...." (Pen. Code, § 1012.)

Here, the alleged misjoinder clearly appears on the face of the accusatory pleading. Accordingly, if appellant wanted to challenge joinder, he should have demurred. He

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[60] (...continued)
[formerly subd. (d)].)

did not do so. His failure to demur pursuant to Penal Code section 1004, subdivision 3 waived any objection. (*People v. Kemp* (1961) 55 Cal.2d 458, 474; *People v. Stone* (1926) 199 Cal. 610, 624; *People v. Brooks* (1985) 166 Cal App.3d 24, 29-30; *People v. Cummings* (1959) 173 Cal.App.2d 721, 730; *People v. Rankin* (1959) 169 Cal.App.2d 150, 158; *People v. Chadwick (1906)* 4 Cal.App. 63, 71; see *Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 721 [demurrer brought on basis of misjoinder].) "This is so even where there is a clear misjoinder. [Citation.]" (*People v. Kemp, supra,* 55 Cal.2d at p. 474; *People v. Brooks, supra,* 166 Cal.App.3d at p. 30.)

Even assuming appellant's motion to sever constituted an objection sufficient to permit appellant to raise the alleged misjoinder on appeal (see *People v. Kemp, supra,* 55 Cal.2d at p. 474), or even if we were to review the trial court's denial of the severance motion on its merits, no cause for reversal has been shown. In this regard, a trial court's ruling on a severance motion will be reversed only if the court has abused its discretion, i.e., if its ruling ""'falls outside the bounds of reason."' [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

> "Refusal to sever on a defendant's motion *might* be an abuse of discretion where '(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials;[61] (2) certain of the

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[61] The absence of cross-admissibility is insufficient, of itself, to demonstrate prejudice from denial of severance. Lack of cross-admissibility is, however, a factor which may suggest possible (continued...)

> charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all; and (4) any one of the charges carries the death penalty.'[62] [Citations.]" (*People v. Davis* (1995) 10 Cal.4th 463, 508, italics added.)

In order to demonstrate that denial of severance was reversible error,

> "defendant must "'clearly establish that there [was] a substantial danger of prejudice requiring that the charges be separately tried."' [Citations.] We examine a pretrial severance ruling on the record then before the court. [Citation.] Even if the ruling was correct when made, we must reverse if defendant shows that joinder actually resulted in 'gross

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[61] (...continued)
prejudice. (Pen. Code, § 954.1; *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Hill* (1995) 34 Cal.App.4th 727, 734-735; *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1286.) Where the offenses would be cross-admissible in separate trials, any inference of prejudice is generally dispelled. (*Arias, supra,* at p. 126.)

[62] However, capital charges need not automatically be severed from noncapital charges, even those involving other victims. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 187-189; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 793-794.)

unfairness,' amounting to a denial of due process. [Citation.]" *(People v. Arias, supra,* 13 Cal.4th at p. 127.)

It has been held that motive may constitute a "'common element of substantial importance"' among different offenses such that they are "'connected together in their commission"' within the meaning of Penal Code Section 954. (*People v. De La Plane* (1979) 88 Cal.App.3d 223, 249-251.) This may be so, depending upon the circumstances, even when the crimes are separated by a lengthy period of time. (*Id.* at p. 251 [approximately 10 months].)

In *People v. Daly (1992)* 8 Cal.App.4th 47, the appellate court upheld denial of severance of attempted murder and robbery counts. The court stated:

> "Respondent argues and we agree the evidence of the robberies and the attempted murders is connected. The prosecution theory was Daly fired on police at the motel in order to avoid going back to prison for the robberies and the kidnaping for which he knew he was under investigation. Thus, the evidence of the robberies would be relevant to show motive and intent at the time of the attempted murders. (Evid. Code, § 1101, subd. (b).) Evidence of the attempted murders would be admissible to show consciousness of guilt as to the robberies and the kidnaping. Daly's principal ground of prejudice, lack of cross-admissibility, therefore fails." (*People v. Daly, supra,* 8 Cal.App.4th at pp. 55-56.)

*Daly* supports joinder in the present case. However, we need not decide whether error occurred in the initial joinder or in denial of the severance motion since it is not reasonably probable that a result more favorable to appellant would have been reached had the automobile counts not been joined with, or had they been severed from, the murder charge. (*People v. Pinholster* (1992) 1 Cal.4th 865, 932; *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *United States v. Lane* (1985) 474 U.S. 438, 446, fn. 8 "improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."].) At least some of the automobile count evidence would have been admissible in separate trials since, contrary to appellant's assertion, it was evidence of motive and intent. That evidence was not particularly inflammatory, especially when judged against a murder charge (see *People v. Ruiz* (1988) 44 Cal.3d 589, 607 [child molestation charges and charges arising out of gang warfare may be unusually inflammatory]), nor was it the type of evidence which might tend to paint appellant as a violent person who was prone to murder. Additionally, given appellant's acquittal on most of the automobile charges, it is clear the jury was not particularly impressed with the evidence. Moreover, because of those acquittals, it is apparent there was no improper spillover from the murder charge to the automobile counts. (See *Ruiz, supra,* at p. 607 [fact jury found defendant guilty of second degree murder as to one of two murders suggests jurors capable of differentiating between charges, so no improper spillover effect].) For the same reasons, appellant has failed to establish that joinder/denial of severance denied him due process.

## IV.

## Admission of Evidence of Prior Confrontations

Appellant contends the trial court erred by admitting evidence of his prior confrontations with peace officers. He says the evidence was inadmissible under section 1101, subdivision (a) or, assuming threshold admissibility under subdivision (b) of that statute, should have been excluded pursuant to section 352.

### A. Background

Appellant moved, *in limine,* to preclude the prosecution from referring to certain of appellant's prior acts, including his prior contacts with law enforcement. Appellant asserted that such evidence was irrelevant, inadmissible pursuant to section 1101, and (assuming admissibility) should be excluded pursuant to section 352. The trial court did not rule on the motion, but advised the prosecution to approach the bench if and when the prosecutor believed the door had been opened. Subsequently, during trial, the prosecutor sought to be allowed to present evidence of two incidents which involved CHP Lieutenant Clements and Bakersfield Police Officer Fletcher, in the event appellant testified that he was not confrontational in his initial contact with Maxwell.[63]

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[63] The prosecutor submitted a report of the incident involving (continued...)

Appellant requested a hearing, before he decided whether to testify, on the items the prosecutor sought to use. The court first reviewed the Fletcher incident, which occurred on August 6, 1989, and ruled that it could be used if appellant testified that he did not start the confrontation with Maxwell or make the statement (i.e., the profanity) to which David Derrick testified. The court rejected the defense argument that the incident was too remote, and found its prejudicial effect did not outweigh its probative value.

The court next turned to the Clements incident, which took place in the mid 1980's. The court noted that the report of this event referred to the death of appellant's child, which the court found to be a collateral issue that would lead to an undue consumption of time. Accordingly, the court ruled the prosecutor could not use this incident for impeachment.

In response, the prosecutor sought to use an incident from 1983 which involved Sergeant Mailer. The court ruled that incident could be used, as it was very similar to the other permissible incident. The court concluded that although there was a difference of opinion as to what took place or was said during the prior occurrences, the prosecutor was entitled to use them if appellant testified he did not use "that language" with Maxwell.

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[63] (...continued)
Fletcher which was prepared around the time of the incident. He also submitted a memorandum from CHP Officer Palmer, dated January 19, 1995, relating information conveyed to him by Clements when Palmer inquired whether Clements had had any adverse contacts with appellant.

Following a recess, defense counsel announced that appellant was going to testify. She then asked whether the court was admitting the prior conduct evidence under section 1101 or section 1103, or as evidence of common plan, scheme, or intent. The court responded, "Motive, intent 1101(b)."

Appellant subsequently testified that in August of 1989, he was stopped for speeding in Oildale by Officer Fletcher of the Bakersfield Police Department. When he was stopped, appellant had been discussing some things with his wife, who was angry at him. Appellant was not angry because of anything Fletcher had done. Appellant, who denied immediately exiting his vehicle and yelling at the officer, showed Fletcher his identification and vehicle registration. Fletcher said something appellant did not like, and appellant "popped off" to him. Matters escalated into a verbal confrontation, during the course of which appellant probably used foul language. However, appellant did not make any threatening gestures.

After appellant signed and accepted a ticket, he pulled up to a store. Fletcher parked at an angle behind him, a few feet from appellant's bumper. Appellant made a purchase in the store, then, as he tried to maneuver his car, be backed into the patrol car and knocked Fletcher's police dog off its perch, angering Fletcher. Fletcher ordered appellant out of the vehicle; when appellant exited, Fletcher grabbed him and appellant grabbed Fletcher. After Fletcher informed appellant that he could be charged with assaulting a police officer with a deadly weapon, appellant apologized. Appellant denied telling Fletcher that he meant to do it when he entered his vehicle, or intentionally backing into the patrol car. He was arrested, then the field sergeant came out and they talked. The sergeant told Fletcher to do what he wanted, and Fletcher chose to let appellant go.

Appellant testified further that he was unable to remember any incident involving Sergeant Mailer of the CHP, which supposedly happened in 1983. He denied threatening Mailer or having Mailer chase him to the area of the Snow Road residence.

During direct examination of appellant, the prosecutor again sought to use the Clements incident, noting that the defense had now chosen to delve into the traffic accident in which appellant's young child was killed and that there had been no undue consumption of time. The prosecutor represented that he would not go into that again, so the court's reason for excluding the incident under section 352 no longer existed. After argument, during which defense counsel again asked the court to exclude all prior conduct evidence, the court agreed that its concerns about undue consumption of time had been obviated. It concluded that the proffered evidence was relevant to motive and intent and, under section 352, its probative value outweighed its prejudicial effect.[64]

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[64] The court subsequently gave defense counsel permission to present evidence of instances within the recent past in which appellant was stopped by police and was not confrontational, and to have her witnesses discuss appellant's good demeanor and cooperation.

After the court's ruling, appellant testified that in the mid 1980s, he was cited for a rolling stop by Officer Clements. Appellant denied walking toward the officer, calling him names, and using foul language. He also denied yelling, 'I'll kick your ass, you don't scare me, I'll take your gun and shove it up your ass along with your badge."

The prosecution called Clements and Fletcher as rebuttal witnesses. Mailer was not called to testify.

Clements testified that in the mid 1980s, he attempted to stop appellant for failing to stop at the limit line of an intersection and possible excessive speed. By the time Clements made a U-turn and caught up with the car, it had stopped in a residential driveway and appellant was rapidly walking away. As Clements exited his own vehicle, he called out that he needed to talk to appellant. Appellant then turned and rapidly walked toward Clements, yelling at him and using foul language. As Clements walked around the front of the patrol car, appellant started flailing his arms. Clements told appellant that he needed to see his driver's license and registration, and appellant continued to yell while producing his license. He seemed irrational.

When appellant was unable to find the vehicle registration, Clements informed him that he had been stopped for speed, but was going to be cited for failure to stop at a stop sign. Appellant's aggression level increased, he clenched his fists, and his body tensed. Appellant yelled something to the effect of, "I'll kick your ass, I'm not afraid of you," and "I'll take your gun and shove it up your ass, along with that badge." Clements called for backup, and appellant continued to yell. He would move toward Clements and away, all the time yelling. Eventually someone appeared in the garage area of the house and said something about not wanting any trouble here. At that point, appellant followed directions and seemed to calm down. Clements was then able to issue a citation. Appellant signed the citation as directed, but then tore it up.

As Clements started to get in his car to leave, appellant came out into the street. Clements stepped out of the vehicle and told appellant to get back into the driveway. Appellant complied, but then came back into the street as soon as Clements prepared to enter his car again. Eventually, Clements got into the car and prepared to leave, but appellant positioned himself directly in front of the patrol car and yelled profanities. In order to drive away, Clements had to back up and go around appellant. Clements subsequently went to court with regard to the citation; there, appellant was totally different than he had been at the time of the stop.

Fletcher testified that on August 6, 1989, he stopped appellant for speeding. Appellant pulled into a convenience store parking lot and quickly walked back to Fletcher's patrol car as Fletcher was getting out. Appellant demanded to know what Fletcher was doing and informed Fletcher that he had no jurisdiction in Oildale. Appellant was very aggressive and belligerent, but produced his driver's license, proof of insurance, and registration at Fletcher's request. When informed that Fletcher was going to issue a citation for speeding, appellant, using profanity, told Fletcher that he could write the ticket, but appellant would not sign it. Fletcher told him that he would sign it or go to jail, whereupon appellant said he would sign it, but would "'see [Fletcher's] ass in jail.'" A few minutes into the stop, Fletcher called for backup for his safety.

Appellant got back into his vehicle, put it into reverse, and rammed the front of the patrol car. The impact was not sufficient to cause damage, but would have injured someone between the vehicles. At the time, Fletcher was on the driver's side, one to two feet from the front bumper of the car. Fletcher asked appellant to get out of the car. Appellant asked what for, and Fletcher opened the door and pulled him from the vehicle. Appellant's fists were clenched, and he appeared to want to fight. Fletcher immediately handcuffed him and placed him in the rear of another patrol vehicle. He then contacted Lynda Sons, who was a passenger in appellant's car, and asked what had happened. She stated that appellant was always this way and had to get in the last word. About 10 or 15 minutes later, appellant appeared to have calmed down somewhat. Fletcher asked him why he did this. Appellant said he deliberately rammed the ear, but that he was a race car driver and that was the kind of temper he had. Eventually, Sergeant Smith was called and appellant was cited and released.

## B. Analysis

### 1. Section 1101

"Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)[65]

> "Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.]

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[65] Section 1101 provides:

"(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

"(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

> The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citations.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, '[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' [Citation.]" (*People v. Daniels, supra,* 52 Cal.3d at p. 856.)

The admission of evidence under section 1101 is reviewed for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Memro* (1995) 11 Cal.4th 786, 864; *People v. Matson* (1974) 13 Cal.3d 35, 40.) However, because evidence of other crimes may be highly inflammatory, its admission must be scrutinized with great care. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.)

We find no abuse of discretion here. "To satisfy the requirement of materiality, the fact sought to be proved may be either an ultimate fact in the proceeding, such as the defendant's specific intent, or an intermediate fact, such as his motive, from which such ultimate fact may be presumed or inferred. [Citation.]" (*People v. Pertsoni* (1985) 172 Cal.App.3d 369, 373.) Here, the prosecution sought to prove appellant guilty of first degree murder. Appellant's not guilty plea placed in issue all elements of that offense, including intent. (*People v. Carpenter* (1997) 15 Cal.4th 312, 379.) As in *Pertsoni,* "the ultimate fact to be proved was appellant's state of mind when he shot [Maxwell]. The prosecution theory was that the killing was premeditated and with malice aforethought, whereas appellant asserted that he acted in self-defense. Because evidence of appellant's motive would tend to establish his state of mind, the materiality requirement was satisfied. [Citations.]" (*Pertsoni, supra,* at pp. 373 374.)[66]

The evidence at issue was highly probative of the prosecution's theory of motive, i.e., appellant's intense, long-standing hatred of law enforcement officers.[67] Evidence of uncharged misconduct is not barred by section 1101 when it is relevant for the purpose of shedding light on the roots of a defendant's hostility toward his or her victim. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

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[66] During the instructional conference, the prosecutor unsuccessfully asked to have the jury told that the prior misconduct evidence could be considered in terms of the absence of self-defense. The trial court remarked, "[T]here's nothing in [section 1101, subdivision (b)] that talks about refuting inferences with regard to self-defense." It is settled that evidence of uncharged misconduct is not barred by section 1101 where it is relevant to rebut a claim of self-defense. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1016; *People v. Sam* (1969) 71 Cal.2d 194, 205-206 & fn. 2; *People v. Simon* (1986) 184 Cal.App.3d 125, 129; *People v. Pertsoni, supra,* 172 Cal.App.3d at pp. 373-374; *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 459.)

[67] In his opening statement, the prosecutor told jurors: "The motive in this case, as you will learn, is Bruce Sons['s] deep-seated hatred for police officers that has gone far back in his life, a hatred so intense that a simple traffic stop escalated into a gun battle that resulted in a murder, clear and deliberate, of a Highway Patrol officer in the prime of his life." The prosecutor returned to this

(continued...)

With regard to the use of uncharged misconduct evidence to show intent, the California Supreme Court has stated that "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) Here, the acts were quite similar, at least in their initial stages. In *Ewoldt,* however, the Supreme Court went on to say:

> "'[T]he recurrence of a similar result ... tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act ....' In order to be

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[11] (... continued)
theme during his summation: "I told you and I'll tell you again that the fabric of this case, the evidence, is woven together and given meaning by the motive. It helps explain why this senseless act occurred. [¶] The motive in this case is Bruce Sons'[s] intense hatred for police officers, the manner in which he reacts when he is confronted by something that he chooses by his own standard not to like, a hatred so deep that a simple traffic stop escalated into a gun battle and resulted in the unnecessary and senseless murder of a California Highway Patrol Officer ...."

> admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.'"" (*Ibid.*, citations omitted.)

Here, the uncharged misconduct was at least somewhat probative of appellant's intent in shooting Maxwell, since it tended to show a deep-seated, long-standing hatred of law enforcement officers, together with an escalation in aggression toward them (from verbal assault to physical assault). Moreover, it was probative of whether appellant intentionally confronted Maxwell, which in turn was relevant to rebut the claim that Maxwell was the aggressor. Other crimes evidence is not barred by section 1101 when it tends "to overcome any material matter sought to be proved by defendant." (*People v. Moten* (1991) 229 Cal.App.3d 1318, 1325.)

*People v. Wells* (1949) 33 Cal.2d 330 is instructive, despite the fact it was decided before enactment of the Evidence Code.[68] In that case, the defendant was convicted of capital assault, with malice aforethought, by a prisoner serving a life term. His victim was Brown, a prison guard. At trial, the prosecution was allowed to place into evidence incidents (some of which were eight to ten years old) in which the defendant had cursed at, threatened, and attacked prison guards and officials. The prosecution was also allowed to prove a series of incidents which took place approximately two years before, and which were somewhat similar to, the events that resulted in the present charge. (*Id.* at pp. 340-341.) In upholding admission of the evidence, the California Supreme Court stated:

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[68] Section 1101 codified existing law. (See Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) § 1101, p. 438.)

> "The evidence of such other instances of misconduct was not admitted for the improper purpose of showing that defendant, because he had done many bad acts, was a bad person likely to do other bad acts, and, therefore, probably committed the crime charged. Rather, it was admitted in order that the jury, if they believed it, might draw the following proper series of inferences: Because defendant, at various times during the 10 years before and at a time about three months after commission of the offense charged, expressed, by words and acts, feelings of hostility toward various custodial officers, he probably felt hostility and bore malice toward the class of custodial officers. Therefore, he probably was hostile to Brown, a member of the class against which his animosity was directed. Therefore, defendant probably injured Brown with 'malice aforethought' rather than by accident while engaged in actions prompted by honest fear for his own (defendant's) safety. More particularly, the 'Jensen incident,' similar in its circumstances to the present incident, permits the inference that since defendant had once availed himself of an opportunity to inflict physical vengeance upon a guard who had participated in disciplining him, it was probable that when defendant injured another guard who had brought disciplinary charges against him he did so in

a spirit of vengeance, not accidentally or because of honest fear. [Citations.]

"In [*Diez v. State* (1912) 149 Wis. 462 [136 N.W. 166]] the charge was murder, in that defendant killed a sheriff who sought to arrest him. Evidence of assaults upon and resistance to arrests by law enforcement officers over a period of seven years was admitted to negative defendant's claim that he believed he was defending himself against a wrongdoer. In the opinion it is explained that (pp. 469-470 of 149 Wis.) 'The principle on which such evidence is received to show intent or state of mind is simply the principle which the human mind instinctively applies in ordinary affairs of life. If the question be whether a given act was accidental or intentional, the fact that the actor has at numerous times performed similar acts under circumstances forbidding the idea of accident is very strong proof that the act under investigation was also intentional.

"'Mr. Wigmore in his work on Evidence (vol. 1, § 302 [3d ed., vol. 2, p. 196]) thus very clearly states the idea:

"'"In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense, or good faith, or other innocent mental state, and tends to establish (provisionally at least, though not certainly) the presence of the normal, *i.e.*, criminal, intent accompanying such an act."

"'It is true that some of the acts of resistance to arrest in the present case were remote in point of time from the act under investigation, but that does not of itself render such evidence incompetent, especially where, as here, the acts were repeated year after year down to a comparatively recent period, and were all apparently inspired by one purpose, namely, the purpose to resist the execution of legal process.'" (*People v. Wells, supra,* 33 Cal.2d at pp. 341-343.)

### 2. Section 352

The evidence presented here was admissible under subdivision (b) of section 1101. However, this determination does not end our analysis. Because evidence of uncharged misconduct is inherently prejudicial, such evidence must have substantial probative value and therefore must be analyzed under section 352. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.)[69] This statute gives the trial court "broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, condition or consumption of time. Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124, citations & italics omitted.) In short, a trial court "abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp, supra,* 18 Cal.4th at p. 371.)

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[69] Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

There was no abuse of discretion here. The evidence was quite probative of the prosecution's theory of the case. Its probative value was enhanced by the fact it came from independent sources and was proved by the testimony of different witnesses. (See *People v. Kipp, supra,* 18 Cal.4th at p. 371.) Moreover, in the context of this case and the prosecution's theory as to appellant's motive, the probative value of the evidence was not lessened by the lapse of time between the charged and uncharged misconduct (see *People v. Ewoldt, supra,* 7 Cal.4th at p. 405; *People v. Wells, supra,* 33 Cal.2d at pp. 341-343), although it was arguably lessened by the fact that, at least as to one of the incidents, no contemporaneous account was available, the officer's memory of the encounter with appellant having been solicited after Maxwell was killed (see *Ewoldt, supra,* at p. 404).

Whenever evidence of uncharged misconduct is admitted, there is an inherent prejudice which flows from the possibility that the jury may be inclined to view the evidence as showing criminal propensity. (*People v. Kipp, supra,* 18 Cal.4th at p. 372.) Here, however, the trial court's instruction minimized any danger the jury might rely on the evidence for an improper purpose. (See *People v. Barnett, supra,* 17

Cal.4th at p. 1119.)[70] Moreover, the evidence was no stronger and certainly no more inflammatory than the testimony concerning the charged offenses, thus decreasing the potential for prejudice. *(People v. Ewoldt, supra,* 7 Cal.4th at p. 405.) Additionally, it "was not unduly prejudicial within the meaning of Evidence Code section 352 because it did not amount to ""evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."" [Citations.]" (*Barrett, supra,* at pp. 1118-1119.) Nor was the evidence merely cumulative with respect to other evidence the prosecution could use to prove the same issue. (See *People v. Thompson* (1980) 27 Cal.3d 303, 318.)[71]

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[70] The trial court did not give a limiting instruction contemporaneously with the evidence of uncharged misconduct. During instructions, however, it told the jury: "Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that or those for which he is here on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show either a motive for the crime charged or the intent with which the act was done. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose." The court also correctly instructed the jury that such evidence had to be proven by a preponderance of the evidence. (See *People v. Carpenter, supra,* 15 Cal.4th at p. 382.)

### 3. Prosecutorial misconduct

Appellant complains that, even assuming the evidence was properly admitted for the limited purpose of showing motive or intent, the prosecutor used it for the improper purpose of showing propensity or criminal disposition. For instance, during cross-examination, the prosecutor asked appellant, "And we have heard many instances this morning and yesterday afternoon of where you have used words almost like this when you have been confronted by officers in the past, haven't we, Mr. Sons?" Appellant replied, "That was then, this is now." The prosecutor subsequently asked, "Weren't you mad at that time in 1989 with Officer Fletcher just like you were mad on the morning of July 11th, 1994 because you had what you would call adverse contacts with police officers that morning?" Defense counsel's objections of vagueness and compound question were overruled. Appellant replied, "I think my testimony was that my wife and I had been discussing some things. She was angry with me and that was already my position, not something that Officer Fletcher did." Appellant later denied threatening Officer Clements or yelling profanities at him. The prosecutor asked, "This is pretty close to what happened out there with Officer Maxwell July 11th, isn't it, Mr. Sons?" Appellant answer, "Not at all," at which time defense counsel's objection that the question was argumentative was sustained. Defense counsel did not object on the basis that the prosecutor was using the evidence for an impermissible purpose.

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[71] Appellant says the evidence was "entirely cumulative" because Officer Simon had testified to appellant's statements concerning his hatred for the police. However, appellant denied telling Simon that he had good reason to hate cops. Thus, the evidence was not cumulative of Simon's testimony.

Both parties presented their summations to the jury after jury instructions were read (thus, after the jury was told it could use the evidence of uncharged misconduct only in terms of motive and intent). During his opening argument, the prosecutor discussed the Fletcher and Clements incidents:

> "Now, we heard about two prior traffic stops quite some time ago from Officer Fletcher and Lieutenant Clements, and those two were significant because those two were traffic stops where Mr. Sons acted and said things and did things almost precisely in the manner in which he did them on the morning of July 11th.
>
> "..............................................................
>
> "Mr. Sons testified that he was mad when he was pulled over on this particular day, July 11th, and I believe, ladies and gentlemen, he was mad just like he was on these other occasions, including the one that I have just described to you.
>
> "..............................................................

> "Even Mr. Sons testified that he was very mouthy and very aggressive And I would say to you at he was mouthy and aggressive in the same manner on July 11th, 1994, based on what these witnesses have told us and based upon the way that Mr. Sons has acted in the past when confronted by police officers simply trying to write him a citation."

Defense counsel did not object to any of the preceding argument. Near the end of his opening statement, the prosecutor told the jury, again without objection:

> "I asked Mr. Sons, isn't it true that you were the cause of this whole confrontation that day, and he got very agitated and he says, I didn't pull Mr. Maxwell over, I didn't slide into his driveway, I didn't throw him across his hood, I didn't Mace him in the face, threaten him with a baton, draw a weapon and start firing.
>
> "So your answer is no? Answer, I'm saying that I am not the one that was the aggressor. I'm not the one that did all of the combativeness in this instance.
>
> "And I ask you, ladies and gentlemen, what caused Officer Maxwell, this professional officer that everybody liked, that nobody had anything bad to say about except, I guess, Victor Smith, in a very mild way, this person that was quiet, professional, did his job, to suddenly become the aggressor. And isn't it more likely, ladies and gentlemen, that Bruce Sons,

> who was always the aggressor in confrontation after confrontation with police officers, acted exactly like he had so many other times, but unfortunately his son was there so Officer Maxwell was confronted with two situations. Unfortunately his son pulled a shotgun out so the officer was confronted with a very dangerous situation and seeing that, Mr. Sons got his own gun, went back there by the washer. And confronted with that, Officer Maxwell was forced to use deadly force that resulted in the loss of his life."

In his closing argument, the prosecutor remarked, "So we can't say it absolutely, but I think it's more likely Bruce got his shotgun out of the car and the garage area, and I think the officer said, hey, I wanted to talk to you, and he was immediately confronted with this profanity just as Mr. Sons did on prior occasions." Once again, there was no objection.

> "'In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury.' The defendant generally need not show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct, because the prosecutor's conduct is evaluated in accordance with an objective standard. 'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct."'

(*People v. Bradford, supra,* 15 Cal.4th at p. 1333, citations omitted.)

"[U]rging use of evidence for a purpose other than the limited purpose for which it was admitted is improper argument." (*People v. Lang, supra, 49* Cal.3d at p. 1022.) It is also improper for a prosecutor to rely on the inference that because the defendant previously committed a particular act, he or she probably did the same thing later. (See *People v. Bergschneider* (1989) 211 Cal. App.3d 144, 162.) Assuming any of the foregoing constituted improper questioning or argument, however, any claim of misconduct is waived because appellant did not object on the ground of misconduct and request an admonition. (See *People v. Samayoa, supra,* 15 Cal.4th at p. 841.) A failure to object and request an admonition waives a claim that the prosecutor committed misconduct by misusing evidence (see *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11), such as by arguing that evidence admitted for one purpose should be used for a different purpose (see *People v. McCray* (1997) 58 Cal.App.4th 159, 173).

Appellant says defense counsel could not object because the trial court's ruling on admissibility of the evidence allowed the prosecutor's misconduct. It is true that "[l]ack of objection is ... excused, as being futile, where the district attorney's conduct has been sanctioned by the trial court's erroneous evidentiary ruling. [Citation.]" (*People v. Pitts* (1990) 223 Cal App.3d 606, 693.) Here, however, there was no erroneous evidentiary ruling: the trial court did not admit the evidence of uncharged misconduct for an impermissible purpose. Accordingly, if appellant believed the prosecutor was using the evidence improperly, he should have objected. His failure to do so waives any claim of misconduct for purposes of appeal.

Appellant notes that, in light of the trial court's ruling, he was questioned on direct examination about the Mailer incident, but the prosecutor did not subsequently have Mailer testify. We find no misconduct and, in any event, no prejudice. There is nothing in the record to suggest that, at the time the prosecutor secured the ruling that evidence of the Mailer incident was admissible, the prosecutor did not intend to prove the incident. Since the prosecutor did not do so, appellant's testimony, in which he denied any confrontation with Mailer, was unrebutted. If a defendant cannot be connected to a prior act, admission of that act normally is not prejudicial. (*People v. Carpenter, supra,* 15 Cal.4th at p. 380.) Moreover, the questioning concerning Mailer was no stronger or more inflammatory than that concerning the other incidents; in light of the evidence of those events, evidence concerning Mailer cannot have prejudiced appellant.

## V.

## Admission of Jeremy's Statement

Appellant next contends the trial court erred in conjunction with the admission of the statement Jeremy made to Detective Brown after Jeremy was apprehended.[72] Appellant says the trial court erred by finding that portions of the statement qualified as declarations against penal interest; by permitting other portions of the statement to be heard by the jury as foundation for improper expert testimony by Young; and by requiring Jeremy to exercise his privilege against self-incrimination in front of the jury. Appellant also contends the prosecutor committed reversible misconduct by treating the foundational statements as substantive evidence.

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[72] At trial, appellant also requested a foundational hearing on the admissibility of statements Jeremy made to several of his relatives. Those statements are not at issue on appeal.

### A. Background

Prior to appellant's trial, Jeremy was found to have committed second degree murder and related offenses in connection with Maxwell's death, and was committed to the California Youth Authority. While Jeremy's appeal was still pending, the prosecutor sought to compel Jeremy's testimony in appellant's case and, in the event Jeremy invoked his privilege against self-incrimination, requested an order granting Jeremy immunity pursuant to Penal Code section 1324. The court subsequently informed the parties that Jeremy was represented by counsel and intended to invoke his privilege against self-incrimination. Accordingly, the prosecutor requested a hearing outside the jury's presence at which Jeremy could be called as a witness and questioned. The prosecutor reiterated his request for a grant of immunity if Jeremy did invoke his privilege. Appellant argued that if Jeremy was declared unavailable to testify, the prosecution should not be permitted to use his taped statement to police because it was an involuntary confession. Appellant also pointed out that there was no previous testimony by Jeremy at which appellant had a right to confrontation and cross-examination.

A hearing was held outside the jury's presence at which the prosecutor called Jeremy, whose attorney was in attendance, to the witness stand. Jeremy stated his name and age, then invoked his privilege against self-incrimination and refused to answer any other questions. Jeremy confirmed that there were no questions regarding the events of July 11, 1994, that he would answer. The court found Jeremy would continue to invoke the privilege with regard to any questions asked of him about that incident. The prosecutor then presented a petition pursuant to Penal Code section 1324 and represented that the immunity would preclude utilization of Jeremy's testimony in any future proceeding whatsoever. The court granted the petition and issued an order requiring Jeremy to answer questions in appellant's trial.

After the order was signed, Jeremy's attorney represented that Jeremy would nonetheless refuse to testify. When the prosecutor responded that Jeremy had no choice, defense counsel stated her belief that it would be prejudicial to have Jeremy refuse to answer in front of the jury. She also reminded the court that there was no transcript of a former hearing in which Jeremy testified; hence, appellant would be denied his right of confrontation under the federal and state Constitutions.

Jeremy was given the weekend to consult with his attorney. In the meantime, the court and parties took up the issue of admissibility of Jeremy's statement to detectives. The parties stipulated that there was a violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) in that Jeremy asked for an attorney but was not provided with one.

When court reconvened on Monday, the prosecutor indicated which portions of Jeremy's statement he believed constituted declarations against interest. He also asserted that, if Jeremy testified inconsistently or refused to testify at all, the entire tape-recorded statement could be played to the jury as a prior inconsistent statement. Defense counsel again raised confrontation concerns, although she acknowledged that case law allowed, if Jeremy was unavailable as a witness, admission of any statements he made in the tape recording that were against his penal interest. The court decided that Jeremy would be brought in after lunch in order to determine whether he would testify; if not, the court would go outside the jury's presence and attempt to coerce him into testifying.

The prosecutor subsequently called Jeremy as a witness in front of the jury. Jeremy answered questions about his name and age, his parents' names, whether he was working during the summer of 1994, where he went to school, where he was living on July 11, and whether he had lived at the property at Snow and Allen Roads. This ensued:

"Q. [by MR. TAUZER] Did you have a car?

"A. [by Jeremy] When?

"Q. On July 11, 1994.

"A. I don't want to talk about none of that.

"Q. Well, you have to.

"A. Well, I don't want to.

"Q. Well, Jeremy, it doesn't matter what you want. You are going to have to talk about it. Did you have a white El Camino.

"A. I'm not going to answer none of that.

"Q. Did you have a white El Camino on July 11th, 1994?

"A. I don't want to talk about none of that.

"Q. Were you at your grandfather's house on Cedarcrest when an officer was shot on July 11th, 1994?

"A. I'm not going to answer any of that. I don't want to talk about none of that.

"Q. Did you spend the night before July 11th, 1994 at the property out there on Snow Road?

"A. Yeah.

"Q. And where did you stay at the [sic] point? The trailer?

"A. The trailer.

"Q. Who else stayed there that evening?

"A. Me and my dad.

"Q. At some point during the evening, did you go over to Club Towing on Rosedale Highway and get your car back?

"A. I don't want to talk about none of that.

"Q. Did you and your father on the morning of July 11th, 1994 drive from the property on Snow Road over to your grandfather's house on Cedarcrest?

"A. I don't want to talk about none of that.

"Q. Did you own a shotgun, Jeremy?

"A. No.

"Q. Did you have a shotgun on July 11th, 1994?

"A. I don't want to talk about that.

"Q. Did your father have a shotgun behind the seat of your white El Camino on July 11th, 1994?

"A. I don't want to talk about that, either.

"Q. Do you recall, Jeremy, coming down an alleyway, a little alleyway, that runs between Patton and Cedarcrest that morning?

"A. No.

"Q. You know what alley I'm talking about?

"A. I don't want to talk about none of it.

"Q. Do you know of an alley that runs parallel to Norris Road between Patton and Mignonette?

"A. I know about an alley, yeah, there.

"Q. And were you and your father traveling down that alley about 9:00 that morning?

"A. I don't want to talk about any of it.

"Q. Do you recall coming out of an alley nose-to-nose with a Highway Patrol car?

"A. I don't want to talk about none of it.

"MR. TAUZER: I think we should take up an issue outside the presence of the jury."

Outside the jury's presence, the trial court reminded Jeremy of the grant of immunity and that he had no legal right to refuse to answer questions. The court ordered Jeremy to answer the questions, but Jeremy refused, even when threatened with contempt. The court then gave Jeremy another 24 hours to think about whether he would testify, although it recognized it was unlikely that Jeremy would change his mind.

The next day, the prosecutor requested that he be allowed to play, with Jeremy on the witness stand, those portions of the tape-recorded statement which the prosecutor believed were admissible as statements against penal interest. The prosecutor's desire was to afford Jeremy an opportunity to explain those portions. Outside the presence of the jury, the trial court indicated its intent to bring Jeremy back in, see if he was going to continue to refuse to testify, and inform him of the prosecutor's intent. The court declined to hold Jeremy in contempt if he continued to refuse to answer questions, viewing it as an idle act. When defense counsel agreed that the court need not go through the formality of holding Jeremy in contempt, this exchange took place:

> "[THE COURT:] Just as a general rule, would you agree, Mrs. Huffman, that some of the statements that Jeremy made to the officers on July 11th could be considered as statements against penal interest on his part?
>
> "MRS. HUFFMAN: Yes.
>
> "THE COURT: And as a general rule, as a general rule, you would agree that if those statements which are, indeed, statements against penal interest

> could be edited such as to delete any accusatory or inculpatory statements with regard to your client, that those could be played, in other words, just doing an Aranda-Bruton type editing?
>
> "MRS. HUFFMAN: Yes."

Jeremy was then brought into court and reiterated his refusal to testify, even if he was forced to sit and listen while his tape-recorded statement was played. The court again directed him to think about it overnight, then sent Jeremy out. The court asked defense counsel to look at the excerpts of the taped statement that the prosecutor proposed to have admitted, and to determine if she had any objection to any particular portion. The court stated that, to the extent the excerpts qualified as statements against penal interest—an exception to the confrontation rule—they would be admitted.

The next morning, after having had the opportunity to review the tape and the transcript, defense counsel objected as follows:

> "MRS. HUFFMAN: [Exhibit] 34A [the transcript of the tape-recorded statement], at the bottom of Page 10, where Jeremy says, 'Right, now we're, but, see, now we're all, we come around in front and we're about, right, my dad, he's way over here, you know and I'm about right here.'
>
> "The next one is Page 11, Detective Brown is asking, the very last lines, where it says Brown, 'And

> so, during this time, where is your dad and what is he doing?'
>
> "The top of Page 12, Jeremy's answer, 'He made his way from here to like the garage, you know.'
>
> "And Page 14, the very last line, the first one is all right, 'So we come around here and he starts, he pulls his gun out,' and then this line I'd ask be deleted, 'As soon as he pulls his gun out, my dad was like behind me, you know.'"'

The prosecutor argued that those portions were admissible as prior inconsistent statements. Alternatively, be contended that, unless appellant was going to deny being present, the statements were innocuous and were in the context of and gave meaning to Jeremy's statements. In response to the court's question, however, the prosecutor acknowledged that Jeremy's statement about appellant being "way over here" referred to a diagram and placed appellant inside the garage. The prosecutor proposed to call Detective Brown to explain where Jeremy said he himself was, without reference to appellant. The prosecutor agreed to refrain from asking Brown where Jeremy indicated that appellant was standing at any particular point in time. The prosecutor stated that he would not use the diagram without prior notice, except to have Brown personally refer to it when indicating where Jeremy said he was. With that representation, the court overruled the defense objection to the first except, despite defense counsel's reiteration of a confrontation problem in that, although she could question Brown, Brown was not the maker of the statement. However, the court sustained the objection to the second passage, finding it was much more specific as to appellant's location and was not in context of being a statement against penal interest.

As to the third passage, defense counsel stated that she did not even know where Jeremy was at that point in time. She acknowledged this passage was not as bad as the second one, and submitted the matter. The prosecutor argued that the passage should be played, as it was very innocuous and very general, and was in the same sentence in which Jeremy was talking about what was happening with him. The court overruled the objection to this passage.

Jeremy was brought back into the courtroom and again stated that he would not answer any questions relating to what may have occurred on July 11. The court found that Jeremy was unavailable as a witness.[73] The jury was brought in, and the prosecutor questioned Jeremy (and Jeremy testified) about the layout of the property at Snow Road and the seizure by the sheriffs department of the white El Camino. Although Jeremy refused to answer questions about going to Club Towing to retrieve the vehicle, he did testify that appellant owned the Ithaca shotgun and that the Winchester was his. He also testified that he went hunting on the morning of July 11 and that appellant watched him. Jeremy also answered questions about some of the cars that were at the shop on the Snow Road property.

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[73] Although the trial court did not expressly do so at this point, it had earlier stated that this would be its finding if Jeremy again refused to answer questions.

Jeremy testified that he made a tape-recorded statement to detectives about what took place on July 11, that he told detectives some of the things about which he refused to testify, and that he related events the way he remembered them. When asked by the prosecutor whether he was present at his grandfather's house when Maxwell was shot, Jeremy admitted that he was. However, he refused to talk about those events or to say whether appellant was present. The prosecutor than played the redacted tape recording for the jury and the court informed the jury that it was the portion of the statement which related to Jeremy's personal conduct on July 11. Jeremy subsequently acknowledged that it was he on the tape, but he refused to answer questions about what he said, even if he was not asked about appellant.

The next witness was Detective Brown. Brown testified concerning his interview of Jeremy, and indicated on an exhibit where Jeremy said he was located at particular times. Brown also testified to gestures Jeremy used during the interview, indicating how people held their hands, body positions, and the like.

Sergeant Young was subsequently called by the prosecution, with defense counsel reserving her examination until her case-in-chief. During that examination, defense counsel questioned Young concerning the conclusion that in order to draw and discharge his firearm, Maxwell must have perceived a threat of death or great bodily injury, and whether that threat was emanating from the garage. This ensued:

> "Q. (By MRS. HUFFMAN) Officer, is it the contention in determining whether Officer

Maxwell was defending himself from a deadly attack, that the attack was emanating from the area of the floor of the garage?

"Do you have any information that would substantiate that?

"A. No, I don't.

"My impression was that the fear that Officer Maxwell had was from something in the garage with the defendant in that area, whether it was on the floor or standing, I don't recall.

"Q. Okay.

"And there is no one that, in any of the investigation that you did, or that was done, that showed that Mr. Sons was standing in the garage with a gun in his hand, is there?

"A. By the investigators, no, but *there were statements by Jeremy [S.], that his father was holding a shotgun.*

"Q. When was this?

"A. This was provided to me with the transcripts from MR. TAUZER of interviews with Jeremy [S.], I believe by the Kern County Sheriff's, or the Bakersfield Police Department.

"Q. And um, at, when you, when were those provided to you, during the break?

"A. It was provided to me earlier this morning and then also on February 1st, on the first day that I came down here and was brought up here on the stand by MR. TAUZER.

"Q. Okay.

*"Now Jeremy said that his father was standing in the garage with a gun, a shotgun in his hand, aiming it as [sic] Officer Maxwell?*

"A. If I can refer to the statement that was made.

"Q. Were you giving the statement—

"MR TAUZER: Excuse me, your Honor, there is a question pending.

"THE COURT: Please wait.

"THE WITNESS: Jeremy made a statement in here that—

"MRS. HUFFMAN: Your Honor, may we take this up out of the hearing of the jury, please?" (Italics added.)

Outside the jury's presence, Young read the statement to which he was referring. In that statement, Jeremy said appellant's gun was not out until Maxwell started to draw his weapon on Jeremy; that Jeremy did not know whether appellant had the gun in the El Camino, although Jeremy did not see it in there; and that when Jeremy first saw appellant with the gun, appellant was in the garage. This ensued:

> "MRS. HUFFMAN: First of all, it doesn't respond to the question I asked.
>
> "Secondly, that's been redacted from the statement that Jeremy [S.] gave that was played in this courtroom, um, and it's based upon the redacted statement.
>
> "I think it's hearsay at this point, and does not answer my question that I asked him.
>
> "THE COURT: Counsel, let me clear up one misconception very quickly, it makes no difference, at this stage of the game, whether it was part of the statement that was kept away from the jury, during the People's case-in-chief or not, and I knew this was going to come up.
>
> "MRS. HUFFMAN: So did I.
>
> "THE COURT: And that's why I kept suggesting that we do this, if we are going to, in terms of hypothetical questions.

"This officer did express his opinion with regard to whether or not Officer Maxwell used excessive force, and his response back a couple of weeks ago was he had an opinion, and the opinion was no excessive force.

"I then indicated that, for today's hearing, he could be cross-examined with regard to all the materials that he had read and or considered, and counsel, when you asked that question, you are inviting him to talk about something that he has read, or something he has considered, and so, as far as I'm concerned, when you asked that question of the witness, the expert is entitled to respond with regard to anything he may have read, and all of it, of course, is hearsay."

The court then had the pending question reread, as it had felt the answer was or was going to be responsive. This followed:

"MR. TAUZER: Yes, actually, what the reporter read back was with a different inflection than MRS. HUFFMAN had asked the question.

"It was like an amazed question.

"He had just said that Jeremy had, he had read information that, where Jeremy said that he had seen his father in the garage with a shotgun, and the question that the reporter read back was an incredulous question, tone of voice of incredulity by MRS. HUFFMAN, so it was specifically on point.

"Secondly, the officer was asked repeatedly by Mrs. Huffman what information he had to lead him to form the opinion, and there is much more in here than just that. I think at this point, while the, it can only come in for, as a basis for the officer's opinion, the officer's opinion has been challenged here, not only with this set of questions, but with previous questions about whether or not this officer believed the officer, Officer Maxwell was acting in response to a firearm, and so all of this information is, of course, something that's, was originally provided to him and provided to him this morning, and those questions have been invited, and not only should the officer be allowed to answer at this point, but I should also be allowed to cross-examine on the subject.

"……………………………………………………………………

"I knew we were in this area, and if Mrs. Huffman didn't want to go there, she shouldn't have gone there, but she has gone there, and this officer should be allowed to express all of his opinions, based upon all of the information he has.

"Everything Mrs. Huffman has asked him about has been hearsay, has been based on hearsay, but that's the nature of an expert opinion, and while I did not attempt to get into specific Jeremy statements, um, she certainly has asked him about all of the basis, any opinion, any fact upon which he formed his conclusion, and this is part of it.

"THE COURT: MRS. HUFFMAN?

"MRS. HUFFMAN: Your Honor, with regard to, and I've been trying to be very careful with questions that I've asked this officer.

"With regard to the redacted statements that Jeremy has made in his taped statement, um, I have tried to stay specifically away from those.

"What, the incredulous question I just asked him was based on a statement that he had made previous that Bruce Sons was armed with a shotgun, and there has been no statement of anybody seeing Bruce Sons armed with a shotgun before Officer Maxwell fired.

"And that's basically where I was going and that's what I was after.

"And um, I'll withdraw the question, as far as that goes, at this point.

"MR. TAUZER: Well, I—

"THE COURT: MR. TAUZER?

"MR. TAUZER: I don't care if she withdraws the question, actually, Jeremy says he saw his dad take the shotgun out from behind the driver's seat of the El Camino, as well, so there is statements that this sergeant has read that Jeremy saw his father with a shotgun, saw him remove it from the vehicle, and saw him in the garage with it, and um, if she withdraws the question, I'm nonetheless going to ask him about those statements.

"THE COURT: MRS. HUFFMAN, do you want to go ahead with it now, so that it comes out now?

"Because if you wait until later, I'm going to let Mr. Tauzer—

"MRS. HUFFMAN: I understand.

"THE COURT:—bring it out.

"...................................................................
.....

"THE COURT: I'll just hearken back to what I said earlier, so everyone understands where I'm coming from.

"Remember I said when I indicated that, with regard to those manuals and the other things, that at first I was not going to let anybody have, I said there is something in there for everybody, and Evidence Code Section 356 certainly would be applicable.

> "And the same holds true, now that we've got the officer back here and he's being examined with regard to his opinion, he's entitled to talk about all the things he relied upon, including things that he learned with regard to what may have gone on."

After the jury returned, defense counsel and then the prosecutor questioned Young about Jeremy's statement to Detective Brown. As a result, most, if not all, of Jeremy's statement came before the jury.

## B. Analysis

### 1. Admission as declaration against interest

Appellant contends the trial court violated his rights to confront and cross-examine witnesses by admitting portions of Jeremy's statement (set out in the statement of facts, *ante*) as declarations against interest. He says the portions were neither distinctly against Jeremy's penal interest nor clothed with indicia of reliability, in that they were wholly self-serving and made under circumstances in which Jeremy had every reason not to tell the truth; that a finding "each of the statements in the fourteen pages admitted by the trial court was 'specifically disserving' to Jeremy's interests ... is simply insupportable;" and that there was no basis for concluding the statements possessed any particularized guarantees of trustworthiness as required under the federal Constitution. Appellant further contends that the exception to the hearsay rule for declarations against penal interest is not so firmly rooted as to permit the introduction of accomplice testimony on critical issues.

As this court recently explained:

"We start with the proposition that the statements in question constituted hearsay and that, as a general rule, hearsay evidence is inadmissible. The chief reasons for this general rule of inadmissibility are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements.

"Section 1230 codifies an exception to the general rule for declarations against interest. It provides: 'Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.'

"'When hearsay evidence is admitted it is usually because it has a high degree of trustworthiness. Thus, declarations against pecuniary or propriety interest are admitted

> because they are unlikely to be false. A declaration against penal interest is no less trustworthy.' In order to exclude untrustworthy statements, however, '[t]he statement must be so far contrary to the declarant's interests "that a reasonable man in his position would not have made the statement unless he believed it to be true."' Moreover, the declarant must be unavailable as a witness; the proponent of the evidence must use the in-court testimony of the declarant if possible." (*People v. Fuentes* (1998) 61 Cal App.4th 956, 960-961, citations omitted.)

In order to qualify as a declaration against interest within the purview of section 1230, the evidence must be limited to statements that were specifically disserving to the interests of the declarant. (*People v. Leach* (1975) 15 Cal.3d 419, 441 fn. 17; *People v. Fuentes, supra,* 61 Cal.App.4 at p. 962.) From this rule, appellant contends the trial court was required to find that *each* statement admitted was distinctly against Jeremy's penal interest, and that such a finding could not be made. However, as set out *ante,* defense counsel was provided with those portions of the statement which the prosecutor proffered as declarations against interest. Defense counsel agreed that some of the statements could be considered statements against penal interest, and that, if they could be edited to delete any accusatory or inculpatory statements regarding appellant, they could be presented to the jury. She subsequently was afforded the opportunity to review the proffered evidence, and objected only to three passages. Her objection was overruled as to two, but sustained as to the third.

Under the circumstances, appellant cannot now challenge, as not constituting declarations against interest, any portions of the excerpt other than the two to which defense counsel's objection was overruled. If counsel believed that other portions proffered by the prosecution did not constitute declarations distinctly against Jeremy's penal interest, she should have objected to them. She did not.[74]

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[74] As to the two portions to which objections were overruled, at the time the trial court ruled on those statements, they appeared to be innocuous. Appellant says they were not, given the subsequent testimony of Detective Brown. At the time it ruled, however, the trial court did not have the benefit of Brown's description of Jeremy's gestures and indications as to his own and appellant's locations. The objection was not renewed in light of Brown's testimony.

"In varying circumstances, appellate courts have applied the abuse of discretion standard in reviewing a trial judge's determinations to admit hearsay evidence when there [were] conflicting inferences and evidence concerning questions of trustworthiness of hearsay declarations or the existence of elements of a hearsay rule exception." (*Montez v. Superior Court* (1992) 4 Cal.App.4th 577, 583-584 cases cited.) We find no abuse of discretion here. Moreover, despite appellant's protestations to the contrary, the two excerpts were sufficiently innocuous so that any error was harmless. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1253 & fn. 5 [setting out standards for reversal under state law and federal Constitution; federal constitutional error appears only when declarant is codefendant and statement is "'powerfully incriminating'"].)

In light of the foregoing, we start from the proposition that the challenged statements met the requirements of section 1230.[75] From this point, we turn to appellant's contention that, notwithstanding admissibility pursuant to section 1230, his rights to confront and cross-examine witnesses, as guaranteed by the Sixth Amendment to the United States Constitution, were violated by admission of the excerpt.

In *Fuentes*, we reviewed the requirements of the confrontation clause of the Sixth Amendment to the United States Constitution, as interpreted by the United States Supreme Court, for admission of hearsay evidence. (*People v. Fuentes, supra,* 61 Cal.App.4th at pp. 963-965.) We observed that, as a general rule,

> "'when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."' (*Fuentes, supra,* at p. 965 [italics omitted], quoting

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[75] Jeremy was "unavailable" within the meaning of the statute by virtue of the assertion of his Fifth Amendment privilege not to testify. *(People v. Gordon, supra,* 50 Cal.3d at p. 1251; *People v. Fuentes, supra,* 61 Cal App.4th at pp. 961-962.)

> *Ohio v. Roberts* (1980) 448 U.S. 56, 65-66 [fns. omitted].)[76]

We then held that, "insofar as declarations against penal interest are concerned, the requirements of section 1230 ... are identical to those of the confrontation clause." (*People v. Fuentes, supra,* 61 Cal App.4th at p. 965.) Thus, where such statements are properly admitted under section 1230, we concluded, 'there is no constitutional violation." (*Fuentes, supra,* at p. 965, fns. omitted.)

In *Fuentes,* we declined to determine whether section 1230, insofar as it concerns declarations against penal interest, codifies a firmly rooted hearsay exception (*People v. Fuentes, supra,* 61 Cal.App.4th at p. 965), although we recognized that it has been so held in at least one appellate case (see *People v. Wilson* (1993) 17 Cal.App.4th 271, 278). Even if it does not, we reasoned,

> "the evidence 'may nonetheless meet Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." [Citation.]' (*Lee v. Illinois* (1986) 476 U.S. 530, 543 [ ].) In our

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[76] We noted that "*Roberts* sets out the general rule; a showing of unavailability and independent indicia of reliability [is] not always mandated by the Constitution. (*Bourjaily v. United States* (1987) 483 U.S. 171, 182-183 [ ] [independent indicia of reliability not required for coconspirator statements, a firmly rooted exception to hearsay rule].)" (*People v. Fuentes, supra,* 61 Cal App.4th at p. 965, fn. 7.)

> view, a declaration which 'so far subjected [the declarant] to the risk of ... criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true' (§ 1230) bears adequate indication of reliability' so as to satisfy the confrontation clause. '[T]he very fact that a statement is genuinely self-inculpatory ... is itself one of the "particularized guarantees of trustworthiness" that makes a statement admissible under the Confrontation Clause.' (*Williamson v. United States* [(1994)] 512 U.S. [594,] 605 [ ].)" (*People v. Fuentes, supra,* 61 Cal App.4th at p. 966.)

Appellant challenges the trustworthiness of Jeremy's statement, noting that Jeremy had been arrested and had every incentive to shift the blame to appellant, as well as the existence of internal inconsistencies and purportedly palpable untruths within the statement. As we stated in *Fuentes,*

> "Of course, a trial court deciding whether to admit evidence under section 1230 must still examine the evidence, in the first instance, for trustworthiness. As the California Supreme Court has explained,
>
> "'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code

> section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. [Citation.]
>
> "'''The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion." [Citation.]' (*People v. Frierson* (1991) 53 Cal.3d 730, 745 [ ].) When sufficient trustworthiness is present to make the statement truly against interest within the meaning of section 1230 and the declarant is unavailable, admission of the statement does not violate the federal Constitution. In short, the same facts that render a statement admissible under the Evidence Code 'provide indicia of reliability sufficient to satisfy the confrontation clause ....' (*People v. Wilson, supra,* 17 Cal App.4th at p. 278.)" (*People v. Fuentes, supra,* 61 Cal.App.4th at pp. 966-967, fn. omitted; see also *People v. Greenberger* (1997) 58 Cal.App.4th 298, 329-331.)

The determination of trustworthiness is reviewed for abuse of discretion. (*People v. Gordon, supra,* 50 Cal.3d at p. 1252.) We find no abuse of discretion here. First, by agreeing that portions of Jeremy's statement constituted declarations against penal interest and then only objecting to limited excerpts, defense counsel conceded that the statements proffered by the prosecution were sufficiently trustworthy to meet the requirements of section 1230. Second, the trial court was entitled to consider not only Jeremy's words, but his circumstances, including his possible motivation and his relationship to appellant. (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) The fact the statement is made postarrest to law enforcement authorities is insufficient, standing alone, to remove the declaration from the purview of section 1230. (See *People v. Fuentes, supra,* 61 Cal.App.4th at pp. 959-960 [statements at issue made during confessions to detectives].) While a person in Jeremy's position might, in the abstract, have an incentive to shift blame to a coparticipant, we cannot conclude Jeremy yielded to this temptation. It is apparent, both from Jeremy's statement and from his conduct during appellant's trial, that, if anything, he was doing his best to protect appellant, with whom he appears to have had a close father-son relationship. (See *People v. Gordon, supra,* 50 Cal.3d at p. 1253.) Indeed, the prosecutor raised this point with the trial court As the California Supreme Court concluded in *Gordon, supra,* at page 1253:

> "In sum, under the abuse-of-discretion standard the court did not err by determining that the against-interest requirement was met. [Appellant's] argument shows only that a court might perhaps have been able to arrive at the conclusion that [Jeremy's] statement did not so far subject him to the risk of criminal liability that a reasonable

> person in his position would not have made it unless he believed it to be true. It simply does *not* show that a court was unable to arrive at the opposite conclusion. Therefore, it does not establish an abuse of discretion."

Relying on this court's opinions in *People* v. *Coble* (1976) 65 Cal.App.3d 187 and *People v. Claxton* (1982) 129 Cal App.3d 638, appellant argues that even assuming the statements at issue satisfied the requirements of section 1230, we must still decide whether, under the circumstances of this case, cross-examination of Jeremy would have served a useful purpose. If so, the denial of such examination violated appellant's constitutional right of confrontation.

In *Coble,* this court stated that "[i]f the extra-judicial statement is of minor importance or on a collateral issue and it satisfies the requirements of hearsay exceptions established by the rules of evidence, it is admissible, but if the extra-judicial statement goes to the heart of the case, if it is 'crucial' or 'devastating' to the defendant, then it cannot be admitted unless the defendant's constitutional right of confrontation is satisfied." (*People v. Coble, supra,* 65 Cal.App.3d at p. 195.) *Coble* further suggested that "... one ultimate test is whether or not the right of cross-examination would serve any useful purpose. If not, then the denial thereof is not a denial of the constitutional right of confrontation." (*Id.* at p. 196.) *Claxton* followed *Coble* without extended analysis. (See *People v. Claxton, supra,* 129 Cal.App.3d at p. 666.)

In *Fuentes* (which was decided after briefing was complete in the present case), we acknowledged that whether cross-examination would serve any useful purpose is presumably one factor a trial court can consider in examining the proffered evidence, in the first instance, for trustworthiness. (*People v. Fuentes, supra,* 61 Cal.App.4th at p. 969, fn. 11.) However, we determined that the United States Supreme Court never imposed *Coble's* restriction on the admission of evidence, and we disapproved *Coble* and *Claxton* to the extent they did so. (*Fuentes, supra,* at p. 969 & fn. 12.) Accordingly, those cases do not assist appellant. Since the statements were properly admitted under section 1230 (a proposition which, as we have discussed, is not open to challenge here), there was no constitutional violation. (*Fuentes, supra,* at p. 965.)

### 2. **Admission as foundation for Young's opinion**

Appellant next contends the trial court committed prejudicial error by admitting, under the guise of foundation for Young's expert opinion on Maxwell's use of force, the remainder of Jeremy's statement.

Appellant first says that Young's opinion itself was inadmissible because it was predicated upon unreliable hearsay. In this regard, "[a]n expert may generally base his opinion on any 'matter' known to him, including hearsay not otherwise admissible, which may 'reasonably ... be relied upon' for that purpose. [Citations.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 918; § 801, subd. (b).) In addition, "an expert may base his opinion upon information that is itself not in evidence, such as a written inadmissible extrajudicial admission [citation]." (*People v. Mazoros* (1977) 76 Cal.App.3d 32, 44.)

On the other hand, while an expert may render opinion testimony on the basis of facts given in a hypothetical question which asks the expert to assume their truth, such a hypothetical question "must be rooted in facts shown by the evidence ..." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *George v. Bekins Van & Storage Co.* (1949) 33 Cal.2d 834, 844.) Moreover, "any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.]" (*Gardeley, supra,* at p. 618.)

Where the out-of-court declarations of other people constitute *reliable* hearsay, they can form the proper basis for an expert's opinion testimony. (*In re Fields* (1990) 51 Cal.3d 1063, 1070; *People v. Cramblit* (1978) 84 Cal.App.3d 437, 448-449.) However, an expert's opinion may not properly be based upon *unreliable* hearsay. (See *George v. Bekins Van & Storage Co., supra,* 33 Cal.2d at p. 844; *Stickel v. San Diego Elec. Ry. Co., supra,* 32 Cal.2d at p. 165; 1 Witkin, Cal. Evidence, *supra,* The Opinion Rule, § 482, pp. 452-453 & cases cited therein.) To this end, section 803 provides:

> "The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that

> is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper."

Assuming that the portions of Jeremy's statement which did not qualify as declarations against interest constituted unreliable hearsay, and, hence, that Young should not have relied on them, appellant failed to object on this ground. As set out *ante,* the grounds stated by defense counsel were, "First of all, it doesn't respond to the question I asked. [¶] Secondly, that's been redacted from the statement that Jeremy [S.] gave that was played in this courtroom, um, and it's based upon the redacted statement. [¶] I think it's hearsay at this point, and does not answer my question that I asked him." Read in context, it is apparent that defense counsel was challenging Young's ability to testify to the contents of the statement that had been withheld from the jury, not to his opinion as resting on an improper basis, and that the trial court and prosecutor so understood the objection.

An evidentiary objection on the wrong ground waives other unarticulated grounds on review. (See *Estate of Huston* (1912) 163 Cal. 166, 172-174.) The rationale for such a rule is clearly understandable: "An objection must specify a reasonably definite statement of the ground or grounds so that a judge may properly pass on the objection and the adversary may have an opportunity to remedy, if possible, any deficiency." (*Cramer v. Morrison* (1979) 88 Cal.App.3d 873, 886.) This is especially true here, as the record does not establish that, excluding from consideration the redacted portions of Jeremy's statement, there remained no proper basis for Young's opinion that Maxwell used reasonable force. (See § 803.)

Nor do we read section 803 as requiring a trial court to exclude, sue sponte, an opinion based on unreliable hearsay. (See *Ribble v. Cook (1952)* 111 Cal.App.2d 903, 906 [error to admit such opinion "at least where objection is made"].) Even assuming section 803 gives a trial court discretion to do so, an appellate court will not reverse a judgment based on failure to exercise that discretion where a proper and specific objection is lacking. (§ 353.)[77]

"Defendant may not challenge on appeal the admission of evidence on grounds not urged in the trial court." (*People v. Price* (1991) 1 Cal.4th 324, 430.) No particular form of objection is required (*People v. Holt* (1997) 15 Cal.4th 619, 666), as section 353 "'does not exalt form over substance' [citation]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1172). However, "it does require sufficient specificity of evidence and legal grounds for the opposing party to respond if necessary, for the trial court to determine the question intelligently, and for the appellate court to have a record adequate to review for error." (*Ibid.*) Accordingly, "'the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.]" (*People v. Holt, supra,* 15 Cal.4th at pp. 666-667.) As appellant's objection did not fairly encompass the claim he now makes and the trial court's comments reveal it did not understand the objection to include the grounds now asserted (see *People v. Salinas* (1982) 131 Cal.App.3d 925, 944), that claim has not been preserved for appeal (see, e.g., *People v. Holt, supra,* 15 Cal.4th at pp. 665-667 [failure to argue statement was involuntary or taken in violation of *Miranda* failed to preserve claim *Miranda* advice inadequate & People failed to establish knowing & intelligent waiver] & *People v. Visciotti* (1992) 2 Cal.4th 1, 51-52 [claim cross-examination constituted inquiry into inadmissible evidence not preserved where relevance & assumed facts not in evidence only objections asserted at trial]; *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1734-1735 [failure to object to hypothetical questions waived challenge to such questions]).

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[77] Section 353 provides:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

"(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

"(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

We next turn to admission of more-or-less the entirety of Jeremy's statement. As a threshold matter, we reject appellant's assertions that the prosecutor "tricked" defense counsel into believing Young's testimony rested on the evidence presented to the jury, that Young testified falsely in this regard, and that defense counsel "unwittingly walked into the trap set by the prosecution." The record simply does not support these claims. For example, appellant says that during his February 1 testimony, Young "acknowledged that he had based his opinion on 'what's been presented to this jury.'" Appellant claims this testimony was false and known to be so by the prosecutor; hence, the prosecutor committed misconduct by failing to correct the record and by "tak[ing] affirmative advantage of the untrue testimony given by his witness on direct[.]"

> In actuality, during the prosecutor's direct examination of Young, this exchange took place:
>
> "Q. You have reviewed transcripts of the testimony of witnesses in this particular case?
>
> "A. Yes, sir.
>
> "Q. And you have reviewed photographs of the crime scene in this particular case?
>
> "A. Yes, I have.
>
> "Q. And you have been provided with information as to the findings of criminalists that have reviewed this particular crime scene?
>
> "A. Yes.

> "Q. And so do you believe that you have a[n] overall view of what occurred—what's been presented to this jury as having occurred on July 11th, 1994, at 6816 Cedarcrest Avenue?
>
> "A. Yes, sir. Based on the information that I've gotten up to this point, that's correct.
>
> "Q. At any point in the situation as it was presented to Officer Maxwell that day, based on the information that's been provided to you, do you feel at any point that he was using excessive force?
>
> "A. No, sir."

At no time did Young state that his opinion was based solely on information that was before the jury. To the extent the exchange might be understood as so implying, it is clear from the record that defense counsel was on notice, before she asked the question which led to admission of the redacted portions, that Young had considered Jeremy's statement. For example, following a recess during defense counsel's examination of Young, this occurred:

> "Q. (By Mrs. Huffman) Sergeant Young, during the break, you've been going over some statements that Mr. Tauzer has furnished you, is that correct?
>
> "A. Yes, ma'am.

> “Q. And reading some kind of reports or statements.
>
> “What statements have you been reading?
>
> “A. *There are some copies of transcripts from Jeremy* [S.], a portion of our departmental investigation that was referred to earlier this morning, and then statements of several witnesses.
>
> “David Derrick, Dinese [*sic*] Kili, some previous contacts of CHP members with the defendant, and then also previous, documents of previous contact with the defendant by Bakersfield Police Department.” (Italics added.)

No reasonable person would think that the prosecutor had furnished Young with a transcript of Jeremy’s trial testimony, such as it was. The reference, both as framed by defense counsel and as answered by Young, is to *statements.* This can only mean Jeremy’s statement to detectives.

Later, this exchange took place:

> “Q. [by Ms. Huffman] In reviewing the offense reports in this matter, can you tell us how Officer Maxwell handled himself in making the contact with Bruce Sons?
>
> “A. From what I have been told, Officer Maxwell made a statement similar to, ‘Wait just a minute, I want to talk to you.’

"Q. That was from a report or statement that you've been handed from one of the witnesses; is that right?

"A. Yes, ma'am.

"…………………………………………………………………

"Q. And you weren't given a transcript from the trial, as it's been progressing, to read, have you?

"A. No, ma'am, I was only given a transcript of my earlier testimony two weeks ago.

"Q. Everything else that you've been given have [*sic*] been statements that the police have gotten together, or Mr. Tauzer has gotten together; is that right?

"A. Yes, ma'am, *or copies of tape recorded interviews and things of that nature.*

"Q. Okay." (Italics added.)

Although Young did not mention Jeremy by name, defense counsel was well aware that a tape recording existed of his statement. Given Young's previous testimony, defense counsel was on notice that Young had been provided with, and had considered, Jeremy's statement. Despite this fact, defense counsel challenged the basis for Young's opinion even though she knew what was in Jeremy's statement and had no reason to believe Young had only been provided with those portions which had already been presented to the jury. Then, instead of stopping when Young mentioned the statement, counsel asked a direct question concerning what Jeremy said. There was no prosecutorial misconduct here and we cannot say defense counsel was misled. Accordingly, it is appropriate for us to consider defense counsel's examination of Young in determining whether error occurred. (See *People v. Arias, supra,* 13 Cal.4th at p. 151 [record failed to establish deception or unfair surprise].)

"'While an expert may state *on direct examination* the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. [Citations.] The rule rests on the rationale that while an expert may give reasons *on direct examination* for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence. [Citation.]"' *(People v. Coleman* (1985) 38 Cal.3d 69, 92, italics added.) Thus, even on direct examination, an expert witness whose opinion is based on inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. *(People v. Gardeley, supra,* 14 Cal.4th at p. 618.)

Here, although the record reflects that Young had been called as a witness on behalf of the defense at the time the issue of Jeremy's statement arose, his examination by defense counsel actually constituted cross-examination. Young had testified almost two weeks earlier on behalf of the prosecution concerning CHP officer training and policy, and had rendered his opinion that Maxwell's use of force was reasonable. As noted, at that time, defense counsel reserved her examination of him until the defense case.

"The courts have traditionally given both parties wide latitude in the cross-examination of experts in order to test their credibility. [Citations.] Thus, a broader range of evidence may be properly used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion. [Citation.]" *(People v. Coleman, supra,* 38 Cal.3d at p. 92; see, e.g., *Laird v. T. W. Mather, Inc.* (1958) 51 Cal.2d 210, 219; *Brown v. Affonso* (1960) 185 Cal.App.2d 235, 238.) The same wide latitude "should be allowed on cross-examination inquiring of expert witnesses the reason for their conclusions. [Citations.]" *(People v. Pacific Gas & Elec. Co.* (1938) 27 Cal.App.2d 725, 732.) Thus, the California Supreme Court has held that where an expert had examined the defendant's record of juvenile misconduct, he could be cross-examined on it (even to the extent of informing the jury of the nature of the misdeeds), "without offending any constitutional guaranty," to determine whether he took it into account in forming his opinion. *(People v. Osband, supra,* 13 Cal.4th at p. 712.) It has also been held that where the defendant called experts who offered opinions based mainly on statements the defendant made to them, the prosecutor was entitled to cross-examine said witnesses regarding any statements or declarations the defendant made to them which formed the foundation for their opinions. *(People v. Whitrmore* (1967) 251 Cal.App.2d 359, 366.)

Subdivision (a) of section 721 permits an expert witness to be "*fully* cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion." (Italics added.) Such was the situation here: defense counsel was cross-examining Young concerning the basis for his opinion. Once the defense attacked Young's opinion, the prosecutor was entitled to rebut the inferences appellant sought to have the jury draw. If appellant did not want certain portions of Jeremy's statement brought before the jury, he should not have attacked Young's opinion in the way that he did.[78]

> "Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. [Citation.] Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citation.]" *(People v. Montiel, supra,* 5 Cal.4th at p. 919; *People v. Coleman, supra,* 38 Cal.3d at p. 92.)

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[78] Even assuming defense counsel's inquiries of Young constituted direct examination, the analysis is the same, since it was the defense which raised the subject of Jeremy's statement with Young.

Sometimes, however, a limiting instruction may not be enough. *(People v. Montiel, supra,* 5 Cal.4th at p. 919.) In such cases, section 352 "authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value." *(Montiel, supra,* at p. 919.) In other words,

> "the trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit the evidence to its proper uses. The exercise of this discretion may require exclusion of portions of inadmissible hearsay which were not related to the expert opinion. [Citation.] Or it may be necessary to sever portions of the testimony in order to protect the rights of the defendant without totally destroying the value of the expert witness' testimony. [Citation.] In still other cases where the risk of improper use of the hearsay outweighs its probative value as a basis for the expert opinion it may be necessary to exclude the evidence altogether. [Citations.]" *(People v. Coleman, supra,* 38 Cal.3d at pp. 92-93.)

We do not read *Coleman* as imposing a sua sponte duty on the trial court, as it appears a section 352 objection was made in that matter. (See *People v. Coleman, supra,* 38 Cal.3d at p. 88.) Other cases speak in terms of the court being authorized (e.g., *People v. Carpenter, supra,* 15 Cal.4th at p. 403) or having discretion (e.g., *People v. Gardeley, supra,* 14 Cal.4th at p. 619) to exclude material from an expert's testimony—in other words, having the ability to do so upon request. Where, as here, no section 352 objection is made, "[w]hile a court may exercise such authority under Evidence Code section 352 [citations], the failure to so act cannot be urged on appeal as error." *(People v. Visciotti, supra, 2* Cal.4th at p. 53, fn. 19.) No objection having been raised, appellant cannot now complain that the trial court abused its discretion by "entirely fail[ing] to weigh the potential prejudice of the incriminating hearsay statements against the probative value of Young's testimony regarding the 'foundation' for his opinion."

We turn now to the method of examination, i.e., virtually reading Jeremy's statement to Young and, hence, to the jury. In this regard, it was defense counsel who initially chose to question Young in this manner. Appellant would hardly seem to be in a position to complain because the prosecutor followed counsel's lead.

Moreover, once appellant placed certain portions of Jeremy's statement before the jury, the prosecutor was entitled to elicit other portions. Section 356 provides in part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party...." As the California Supreme Court has explained,

> """ In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other

> statements have some bearing upon, or connection with, the admission or declaration in evidence and are not excluded by a rule of law other than the hearsay rule.''' [Citations.]" *(People v. Williams* (1975)
> 13 Cal.3d 559, 565, italics omitted.)

Thus, while "'[i]t was certainly never intended that under the guise of said section there may be lugged into the record of a case a mass of irrelevant and incompetent testimony which might have a tendency to militate seriously against the rights of the party against whom it was admitted[,]'" "'[i]f the part not given is explanatory of or in any way qualifies or modifies the part given, then, in such case, the part not given by the witness may be shown." *(People v. Gambos* (1970) 5 Cal.App.3d 187, 193.)[79]

Of course, section 356 cannot override a defendant's rights to confront and cross-examine witnesses, as *Williams* implicitly acknowledges with its reference to exclusion by a rule of law other than the hearsay rule. However, a confrontation claim can be waived. (See, e.g., *People v. Dennis, supra,* 17 Cal.4th at p. 528 [failure to object waives contention admission of extrajudicial statements violated Sixth Amendment right of confrontation]; *People v. Alvarez, supra,* 14 Cal.4th at p. 186 [bare reference to "'confrontation rule'" in defendant's moving papers insufficient, absent timely and specific objection predicated on Sixth

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[79] We decline to comb the record in order to determine whether every single bit of Jeremy's statement, as presented through Young, fell within the ambit of section 356.

Amendment's confrontation clause, to preserve issue for appeal]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [failure to object on confrontation clause grounds waives issue]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044 [failure to timely and specifically object on same ground asserted on appeal waives claim admission of codefendant's statement violated defendant's Sixth Amendment right of confrontation].) We conclude that, assuming a confrontation clause violation validly could be claimed (see *People v. Osband, supra,* 13 Cal.4th at p. 712), waiver occurred in the present case.

Defense counsel knew the contents of Jeremy's complete statement. She was also on notice that Young had had access to that statement. Yet, counsel asked Young a broad question about there being nothing to support his assumption that Maxwell was responding to appellant being in the garage with a gun in his hand.[80] Then, instead of moving to strike when Young mentioned Jeremy's statement, or immediately asking to take up the matter outside the presence of the jury, defense counsel pursued the subject. She did not raise a confrontation clause objection.[81] Instead, she chose to question Young in a manner that brought out, verbatim, portions of Jeremy's statement that previously had been excluded.[82] Under these circumstances, appellant has waived any confrontation clause claim. Simply put, he broached the subject and he established the method of inquiry. Moreover, the request to withdraw the particular

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[80] For example, the question could have been limited by naming the various eyewitnesses, with the exception of Jeremy. We express no opinion concerning whether such a question would have opened the door for the prosecutor to raise the subject of Jeremy's statement in rebuttal.

[81] Appellant previously objected to admission of Jeremy's statement *as substantive evidence* on confrontation clause grounds. We question whether that objection was sufficient to cover use of Jeremy's statement as foundation for, or to impeach, expert (continued...)

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[81] (...continued)
opinion. (See *People v. Alvarez, supra,* 14 Cal.4th at p. 186; *People v. Hill* (1992) 3 Cal.4th 959, 994-995 [objection that uncharged accomplice, whose extrajudicial statements were admitted, should have been subject to cross-examination through grant of immunity or required to invoke Fifth Amendment privilege in front of jury, insufficient to preserve claim that admission of statements violated confrontation rights as defined in *Bruton v. United States* (1968) 391 U.S. 123, 126-127 & *People v. Aranda* (1965) 63 Cal.2d 518, 528-530]; *People v. Price, supra,* 1 Cal.4th at p. 440 [where only objection was that evidence constituted improper rebuttal, objection was insufficient to preserve claim that admission of evidence violated defendant's right to counsel].)

[82] We are not faulting counsel for taking this approach. It is possible Jeremy's statement could have been asked about in more general terms, or that portions could have been selected and presented in a fashion which would not have resulted in wholesale admission of the statement. (See *People v. Coleman, supra,* 38 Cal.3d at pp. 92-93.) By doing it this way, however, counsel was able to get before the jury portions of the statement which were favorable to appellant's claim that he acted in self-defense against an officer who was out of control. Counsel also got Young to acknowledge that there were a number of different versions of what witnesses saw, but that, when he assumed what was in Maxwell's mind, he also assumed the various witness statements were correct.

question was insufficient to preclude inquiry into the area; as the prosecutor pointed out, Young's opinion and the basis therefor were challenged by more than just that question.

Appellant cites us to *People v. Anderson* (1987) 43 Cal.3d 1104. In that case, during the presentation of the codefendant's (Sheila's) diminished capacity defense, each expert was cross-examined on the basis of his opinion and responded by recounting statements Sheila had made incriminating the defendant. The defendant timely claimed that, because Sheila did not testify, he was denied his rights of confrontation and cross-examination. *(Id.* at pp. 1118-1119.) The California Supreme Court held that admission of the statements was error under *Bruton* and *Aranda;* the statements implicated Sheila while also incriminating the defendant. Moreover, they were potentially prejudicial as they accused the defendant, in addition to which they were inevitably suspect as they attempted to shift blame. *(Anderson, supra,* at p. 1122.) The court further held that application of the *Bruton-Aranda* rule did not turn on whether the codefendant's extrajudicial statements were admitted for their truth; instead, it was applicable even though the statements were admitted solely to impeach experts' opinions of Sheila's mental state. (*Anderson, supra,* at pp.1123-1125.)

We do not find *Anderson* dispositive for several reasons. First and foremost, the issue in *Anderson* was analyzed in terms of *Bruton-Aranda* error. In order to raise such a claim on appeal, a defendant must have specifically objected on *Bruton-Aranda* grounds in the trial court. *(People v. Hill, supra, 3* Cal.4th at pp. 994-995.) Appellant made no such objection here and in fact, as we have seen, raised no confrontation clause concerns in relation to the use of Jeremy's statement as a basis for Young's expert opinion. In addition, as we have also discussed, appellant was the one who first entered the forbidden territory, a situation far different from that in *Anderson.* Thus, while *Anderson* is instructive on the issue of whether bringing an extrajudicial statement before the jury through an expert can constitute a violation of the confrontation clause, it does not lead to a finding of error in the circumstances of the present case.

### 3. Prosecutorial misconduct

Appellant contends the prosecutor committed misconduct in connection with his use of Jeremy's statement. We have already rejected the claims that the prosecutor failed to correct untrue or misleading testimony by Young and that he took unfair advantage of such testimony. Appellant also contends that "the prosecutor engaged in the purely gratuitous use of Jeremy's inadmissible statements after the trial court's erroneous admission of 'foundational' hearsay." Appellant refers to the prosecutor's practice of reading sometimes lengthy excerpts from the statement to Young; however, defense counsel was the first to undertake this practice and, in any event, there was no objection.[83]

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[83] We are not faulting counsel for taking this approach. It is possible Jeremy's statement could have been asked about in more general terms, or that portions could have been selected and presented in a fashion which would not have resulted in wholesale admission of the statement. (See *People v. Coleman, supra,* 38 Cal.3d at pp. 92-93.) By doing it this way, however, counsel was (continued...)

Appellant further contends the prosecutor committed misconduct by using the foundational statements as substantive evidence. During the giving of instructions, the trial court told the jurors:

> "Certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were admonished, that is advised, that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider such evidence for any purpose except the limited purpose for which it was admitted.
>
> "All of the statements of Jeremy [S.] that were read during the testimony of Sergeant James Young were not being admitted for the truth of those statements but as part of the information upon which the witness based his opinion and you are to accept it in that limited area."[84]

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[83] (...continued)
able to get before the jury portions of the statement which were favorable to appellant's claim that he acted in self-defense against an officer who was out of control. Counsel also got Young to acknowledge that there were a number of different versions of what witnesses saw, but that, when he assumed what was in Maxwell's mind, he also assumed the various witness statements were correct.

[84] It does not appear that a limiting instruction was given contemporaneously with Young's testimony. Nevertheless, the clear import of the instructions was that those of Jeremy's statements which were read during Young's testimony could not
(continued...)

During his summation to the jury, the prosecutor discussed Young's testimony. At one point, he stated:

> "Sergeant Young described how Officer Maxwell used demeanor, how he attempted to use the control hold on an out of control Bruce Sons, how he attempted to use chemical mace to control the situation, how he attempted to use an impact weapon, the baton, as he followed Jeremy [S.] around the vehicle, and how when he was confronted with the weapon, he used the gun because, I believe, ladies and gentlemen, based on this evidence that when the officer was in the process of trying to knock the shotgun out of Jeremy [S.]'s hands, he looked back here, and what did he see? He saw Bruce Sons with a shotgun, this Ithica [*sic*] shotgun that belonged to Bruce Sons, the mad, angry Bruce Sons who was prepared to use this shotgun on him, and Jeremy [S.] dropped to the ground, as he told you that he did on the tape, and the fire opened. And the first shooter, I believe, ladies and gentlemen was Officer Maxwell,

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[84] (...continued)
be considered for the truth of the matter asserted. The prosecutor also called this distinction to the jury's attention, and reiterated that those statements could only be used to support Young's opinion and not for the truth of the matter or as evidence for other purposes. The distinction does not appear to have been lost on the jury; during deliberations, jurors sent out a note requesting exhibit 34b, the tape of Jeremy's "testimony." Exhibit 34b was the redacted tape of those portions of the statement that were admitted as declarations against penal interest.

in the proper use of deadly force when confronted with a life threatening situation."

Later, the prosecutor argued to the jurors:

> "Now, why was that shot, that first shot, why did it go to the washing machine, and why did Bruce fire immediately?
>
> "I would suggest to you, ladies and gentlemen, that in those first two seconds that shotgun was in the scabbard just like Jeremy said on the tape that was relied on by Sergeant Young, and I think it took a few seconds to get that shotgun out of the scabbard.
>
> "And during that period of time, Bruce Sons ducked down behind that washing machine, and that's why that first shot went right towards the little area of that washing machine."

Appellant did not object to either of the foregoing remarks, and he has not shown that such an objection would have been futile. Moreover, an admonition would have cured any harm. Accordingly, appellant has waived any claim of misconduct by failing to object. (See discussion in part IV.B.3., *ante; People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Gionis, supra, 9* Cal.4th at p. 1214, fn. 11, *People v. McCray, supra,* 58 Cal.App.4th at p. 173).

### 4. Invocation of privilege in jury's presence

Appellant next contends the trial court committed reversible error by requiring that Jeremy exercise his Fifth Amendment privilege in front of the jury. What happened in this regard is set out, *ante.*

A party has no right to require a witness to invoke his or her privilege against self-incrimination in front of the jury. (See *People v. Hill, supra,* 3 Cal.4th at pp. 991-992.)[85]

This is so because

> "[n]o inference may properly be drawn from the invocation of a privilege. [Citation.] Allowing a witness to be put on the stand to have the witness exercise the privilege before the jury would only invite the jury to make an improper inference. [Citations.] Therefore, 'it is the better practice for the court to require the exercise of the privilege out of the presence of the jury.' [Citation.] [The California Supreme Court has] 'commend[ed]' the approach 'as a means by which to avoid the potentially prejudicial impact of the witness asserting the privilege before the jury.'

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[85] The authorities on this issue appear to deal with situations in which the witness had the right to invoke a particular privilege. Due to the grant of immunity, Jeremy presumably did not. For purposes of our analysis, we assume this makes no difference. We also assume it makes no difference that Jeremy did not expressly invoke the privilege in front of the jury, but simply stated, repeatedly, that he did not want to, or would not, talk about particular matters.

> [Citation.]" *(People v. Frierson, supra,* 53 Cal.3d at p. 743.)

"Under certain circumstances the forced invocation of a testimonial privilege in the presence of the jury will warrant reversal. One such circumstance is when the government makes a 'conscious and flagrant effort to build a case based on the unfavorable inferences which inure from a claim of the privilege.' Another is when those inferences add critical weight to the government's case in a form that is not subject to cross-examination." *(US. v. Brown* (5th Cir. 1994) 12 F.3d 52, 54, fns. omitted; see *People v. Fierro* (1991) 1 Cal.4th 173, 232.)

We are satisfied that neither circumstance was present here. Although Jeremy was adamant that he would not testify concerning the events of July 11, 1994, the prosecutor's questioning of Jeremy was not an attempt to build a case based on improper inferences, but to coerce Jeremy to testify.[86] Indeed, Jeremy was willing to answer some of the questions put to him. Significantly, the inferences did not add critical weight to the prosecution's case. With the exception of the question whether appellant had a shotgun behind the seat of the El Camino, appellant testified concerning all of the pertinent subjects about which Jeremy refused to testify. The questions asked of Jeremy were not phrased in such a way—especially since many of them concerned Jeremy's own conduct on July 11—that they tended to call appellant's testimony into question. Thus, despite the absence of any cautionary instruction to the jury not to draw any inferences with respect to Jeremy's credibility or appellant's guilt or innocence based on invocation of the privilege (see *People v. Fierro, supra,* 1 Cal.4th at pp. 233-234), we find no cause for reversal.

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[86] Given Jeremy's repeated insistence that he would invoke the privilege despite the grant of immunity, the better practice would have been to excuse him as a witness. (See *People v. Hill, supra,* 3 Cal.4th at p. 991; *People v. Cornejo* (1979) 92 Cal.App.3d 637, 659; *People v. Johnson* (1974) 39 Cal.App.3d 749, 759-760.)

## VI.

## Sufficiency of the Evidence

Appellant next contends that his conviction for first degree murder must be reversed because the evidence is insufficient to support a finding of premeditation. Appellant reasons that there can have been no premeditation before the first shotgun blast since the prosecution's expert conceded that firing must have been accidental; Laskowski's opinion that appellant advanced on Maxwell before firing the final shot is entitled to no deference since the place the shotgun shell came to rest was, as Laskowski conceded, a matter of chance; and that "[e]ven passing the absurdity of Laskowski's 'velcro-shotgun-shell' theory is the further absurdity of asserting that Sons was capable of premeditation in the period after at least nine shots had been fired at him and his stepson."

Issues regarding the sufficiency of evidence are determined according to well-established legal principles, which apply regardless of whether the prosecution's case relies primarily on circumstantial evidence. (*People v. Bean, supra,* 46 Cal.3d at p. 932.)

> "'When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation.] The reviewing court presumes in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citations.] Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.] 'Whether the evidence presented at trial is direct or circumstantial, ... the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation]" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208, italics in original.)

Moreover, "[e]ven if we might have made contrary factual findings or drawn different inferences, we are not permitted to reverse the judgment if the circumstances reasonably justify those found by the jury." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.) Thus,

> "[a]lthough it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" (*People v. Bean, supra,* 46 Cal.3d at pp. 932-933.)

"All murder which is perpetrated ... by any ... kind of willful, deliberate, and premeditated killing, ... is murder of the first degree." (Pen. Code, § 189.) In explaining the standards to be applied, the California Supreme Court has stated:

> "As we have observed in numerous cases, we apply the tripartite test of *People v. Anderson* (1968) 70 Cal.2d 15, in deciding whether the evidence is sufficient to support a finding of premeditation and deliberation based on these three factors: (1) planning activity; (2) motive (established by a prior relationship and/or conduct with the victim); and (3) manner of killing. *(Id.*, at pp. 26-27; *People v. Wharton* (1991) 53 Cal.3d 522, 546-547; cf. *People v. Haskett* (1982) 30 Cal.3d 841, 849, fn. 1.) '[T]his court sustains verdicts of first degree murder typically when

there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).' (*Anderson, supra,* 70 Cal.2d at p. 27.)

"We have recently explained that the *Anderson* factors do not establish normative rules, but instead provide guidelines for our analysis. In *People v. Thomas* (1992) 2 Cal.4th 489, 517 we observed: 'The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law in any way.'

"Thereafter, in *People v. Perez* (1992) 2 Cal.4th 1117, 1125 we reiterated the *Thomas* statement, and added that '[t]he *Anderson* guidelines are descriptive, not normative. [Citation.] The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.] [¶] In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and

> deliberation.... The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.' (See [*People v.*] *Davis, supra,* 10 Cal.4th at p. 511.)
>
> "Finally, we have recognized that it is not necessary that the *Anderson* 'factors be present in some special combination or that they be accorded a particular weight.' (*People v. Pride* (1992) 3 Cal.4th 195, 247.) Nonetheless, we are guided by the factors in our determination whether the murder occurred as a result of 'preexisting reflection rather than unconsidered or rash impulse.' (*Ibid.*)" (*People v. Sanchez* (1995) 12 Cal.4th 1, 32-33, parallel citations omitted.)

Where evidence in all three *Anderson* categories is present, a verdict generally will be sustained. (*People v. Proctor, supra,* 4 Cal.4th at p. 529.)

The evidence presented at trial in this case is set out at length, *ante,* and we need not repeat it here. When viewed as a whole, it is sufficient to sustain appellant's conviction for first degree murder. (See *People v. Bloom, supra,* 48 Cal.3d at p. 1210.) First, the manner of killing—a shotgun blast to the face, followed by another to the chest, both from fairly close range—does not necessarily establish a sudden explosion of violence instead of a calculated killing (see *People v. Hernandez, supra,* 47 Cal.3d at p.350), but instead can be seen as indicating a preconceived design to take life (see *People v. Mayfield* (1997) *14* Cal.4th 668, 768 [firing at face]; *People v. Caro* (1988) 46 Cal.3d 1035, 1050 [close-range gunshot to face]). Second, there was evidence from which the jury could have inferred motive: appellant's long-standing hatred of law enforcement officers, as shown in part by his escalation of the confrontation with this particular officer. Third, there was evidence from which the jury could have inferred planning, in that appellant either retrieved his shotgun and went into the garage or went into the garage and obtained the weapon there, or (more significantly) in that he advanced on Maxwell, shot him, pumped another round into the chamber, and fired the fatal shot.

With regard to Maxwell firing first and appellant advancing on the officer, the California Supreme Court has made it clear that "[t]he process of premeditation and deliberation does not require any extended period of time." (*People v. Mayfield, supra,* 14 Cal.4th at p. 767; *People v. Perez, supra,* 2 Cal.4th at p. 1127; see also *People v. Kelly* (1990) 51 Cal.3d 931, 956.) Premeditated and deliberated conduct involves thoughtful, though not necessarily protracted, consideration beforehand. (*People v. Millwee* (1998) 18 Cal.4th 96, 134.) A defendant need not have contemplated killing his or her victim at the outset, but may form a considered intent to do so during the course of events. (See, e.g., *Mayfield, supra,* at p. 768; *Kelly, supra,* at p. 957.)

Appellant attacks Laskowski's opinion, upon which the scenario of him advancing on Maxwell is based. However, an expert may properly give an opinion such as that rendered by Laskowski. (See *People v. Mayfield, supra,* 14 Cal.4th at pp. 766-767 [expert opinion regarding positions of defendant & victim at time fatal shot fired was not legally prohibited].) Moreover, as the California Supreme Court has observed, "The points raised by defendant go to the weight of the evidence and were proper matters for the jury to consider but the evidence is nonetheless evidence of planning activity." (*People v. Crandell* (1988) 46 Cal.3d 833, 868.)

In sum, "'[a]lthough the evidence was far from overwhelming, we need not be convinced beyond a reasonable doubt that defendant premeditated the [murder]. The relevant inquiry on appeal is whether "'*any* rational trier of fact"' could have been so persuaded."' (*People v. Caro, supra,* 46 Cal.3d at pp. 1050-1051, citations omitted.) Since a rational trier of fact could have been so persuaded, appellant's contention fails.

## VII.

## Failure to Answer Jury's Questions

Appellant contends the trial court committed reversible error by failing to answer the jury's post-deadlock questions concerning premeditation. He says the error allowed the jury to find first degree murder without understanding the required mental state.

### A. Background

Among other subjects, the trial court gave the jury extensive instructions on first and second degree murder, voluntary and involuntary manslaughter, and so-called perfect and imperfect self-defense. In conjunction with the murder instructions, the trial court gave CALJIC No. 8.11 (5th ed. 1988 bound vol.), as follows:

> "Malice may be either express or implied. Malice is express when there is manifested an intention unlawfully to kill a human being. Malice is implied when, one, the killing resulted from an intentional act, two, the natural consequences of the act are dangerous to human life and, three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life.
>
> "When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.
>
> "The mental state constituting malice aforethought does not necessarily require any ill-will or hatred of the person killed. The word aforethought does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act."

This instruction was immediately followed by CALJIC No. 8.20 (5th ed. 1988 bound vol.), to wit:

> "Let us talk about first degree murder. Ladies and gentlemen of the jury, all murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.

"The word, quote, willful, end quotes, as used in this instruction means intentional. The word, quote, deliberate, end quotes, means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word, quote, premeditated, end quotes, means considered beforehand.

"If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill which was the result of deliberation and premeditation so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other conditions precluding the idea of deliberation, it is murder of the first degree.

"The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill is [*sic*] truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not in the duration of time but rather the extent of the reflection.

"A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and

> premeditation as will fix an unlawful killing as murder of the first degree.
>
> "To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and having in mind the consequences, he decides to and does kill."[87]

The jury retired to deliberate on the morning of February 24, 1995. After a weekend recess, deliberations continued on February 27 and 28, and on March 1 and 2. On the afternoon of March 2, the jury sent out a note which read, "'unable to reach unanimous decision on count Number 1[.]'" The jury was brought in and the foreperson was asked whether, if deliberations continued, he personally felt there was a reasonable probability that a verdict might be reached. The foreperson responded, "No, sir." When the court asked whether it could do anything further to assist the jury in arriving at its verdict, such as further jury instruction or reading of testimony by the court reporter, the foreperson replied, "Hmm, possibly clarification of jury instructions." The court then asked the jury to return to the jury room and discuss where clarification might be of assistance, and then to send out another note.

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[87] Both instructions are correct statements of the law. (*People v. Perez, supra,* 2 Cal.4th at p. 1123 [CALJIC No. 8.20]; *People v. Saille* (1991) 54 Cal.3d 1103, 1115 [CALJIC No. 8.11]; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221 [same].)

The jury subsequently sent out a note which read, "'additional jury instructions that might clarify and better define CALJIC 8.20, Pages 45 and 46 of the instructions and CALJIC 8.11, Pages 43 and 44 of instructions[.]'" Following a recess to allow counsel to think about their responses, this occurred:

> "MR TAUZER: Your Honor, I looked at both of these instructions. 8.1 *[sic]* and 8.20—and obviously I don't know specifically what's troubling any of the jurors, but I have no way of defining it anymore explicitly about these instructions.
>
> "THE COURT: Thank you. Mrs. Huffman?
>
> "MRS. HUFFMAN: Your Honor, I'm in the same position.
>
> "THE COURT: Me, too. We can do one of two things, I suppose. The first is to bring them back in and tell them that there will be no further definition. And sometimes I've suggested to them that they reread them, making sure they are not getting hung up on any particular word or phrase, but in fact that they are reading them in the context.
>
> "The other thing I could do is to bring them back in and let them know that we cannot go through and reword this in its entirety but ask them if there is anything in particular that they would like to have clarified.

"Let me go in reverse order. Mrs. Huffman, what do you think?

"MRS. HUFFMAN: No, your Honor.

"THE COURT: What do you suggest?

"MRS. HUFFMAN: Just let them know that it can't be reworded.

"THE COURT: Mr. Tauzer:

"MR. TAUZER: I think the court had a good suggestion to ask them if there is something in particular—I mean, well, I can look at this and not think of what could be reworded. They might have some other idea.

"THE COURT: I will candidly confess that I would be very, very reluctant to reword any part of either one of these two instructions.

"MR TAUZER: I think the court's suggestion to ask them to read these in their totality might be a good one.

"THE COURT: Mrs. Huffman?

"MRS. HUFFMAN: Only problem with that, your Honor, is it's singling out the instructions. They are supposed to be taken in a whole, as a whole, one with the other. And I think if the court says reread them again, that it's—if we do anything with these particular instructions other than to say we cannot give you any further information I think is pinpointing and could be a cause for problems.

"THE COURT: Indeed it could be, but I'm willing to take that limited risk at this point in time. Let's bring the jurors back in, please.

"MRS. HUFFMAN: Over my objection, your Honor?

"THE COURT: Yes.

"The record will reflect that the jurors have rejoined us.

"Ladies and gentlemen of the jury, we have given some thought and consideration to the note that you have sent out.

"My bottom line is to suggest to you that, if you can, that you pinpoint the area that you think needs clarification. That's one thought.

"Another thought is that sometimes—I want to say this very carefully because I don't want anyone to misconstrue it. Sometimes we focus on a particular part of an instruction, a particular word or a particular

> phrase and that's okay so long as you remember that early instruction that indicates that you are not to single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others. In other words, that goes along, I think, with one of the first answers I gave you in terms of keeping things in context.
>
> "Okay? I know that what I just said is not, at least, I wouldn't think, is satisfactory in terms of a response, but I'm going to send these instructions back in and wait for your next note, whatever it may be.
>
> "I'm not going to go through and reword both of those instructions in their entirety. I'm not going to do that. But I would like, if you can, to pinpoint the area of concern."

The jury was then returned to the jury room. The court and counsel discussed the situation, and all agreed the jury was deadlocked on first degree murder. A recess followed, then this ensued:

> "[THE COURT:] I've asked that you be provided with a copy of this most recent note which reads, quote, does a person's natural temperament or boiling point have to be considered, comma, or can we expect the defendant to have to conform to the concept of behavior of a reasonable person in the same situation, end quotes.

"Mr. Tauzer, are you prepared to respond?

"MR TAUZER: No.

"THE COURT: Mrs. Huffman, are you prepared to respond?

"MRS. HUFFMAN: Your Honor, they are having this request as it pertains to CALJIC 8.20 which is deliberate and premeditated.[[88]]

"I don't think that deliberate and premeditation is based on a reasonable man standard. This is an individual reflection of a particular defendant, not a conformance to a concept of behavior as a reasonable man.

"And it's—as 8.20 states, it has to be a cold, calculated judgment and I think that's a personal judgment rather than a reasonable man standard, especially in light of the last paragraph of 8.20 .... There is nothing in this particular jury instruction that's talking about reasonable man standard.

"THE COURT: Mr. Tauzer, let me know when you are ready.

"MR. TAUZER: It's a little difficult because I don't know the exact context. I think that we are looking at actual deliberation, actual premeditation. In other words, I agree to a point—if that's the context that they are asking the question in, I agree to a point that if we are looking at actual deliberation and actual premeditation.

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[88] The handwritten note bore the heading, "As pertains to CALJIC 8.20."

"Obviously the difficulty I have is a person's temperament or boiling point has to be considered but, I'm not sure what one would tell them about that because obviously somebody that has a short fuse could—I mean they can deliberate and perhaps premeditate quicker than anybody else or I mean obviously it has to be considered, but I'm not sure that we know how it could be considered, how it should be considered.

"I suppose what I'm saying is that the standard is whether or not Mr. Sons deliberated and premeditated, and his temperament or his natural temperament or his boiling point must be considered in making that determination. But what effect that has on the determination is a matter for the jury to determine.

"THE COURT: Counsel. We are going to be in recess for a few minutes while I give this some more thought and you give this some more thought.

"When I read this the first time, I had a particular reaction. When I read it the second time, I had a different reaction. When I read it the third time, I went back to my initial reaction. We need to think about this a little bit more.

"My initial reaction was and at the moment is that this note cannot be answered. If we had just the second part of it about expecting the defendant to have to conform to the concept of behavior of a reasonable person in the same situation, the answer to that is no, especially if it's in light of a second degree, but more particularly a voluntary.

"When we just take the first part about a person's natural temperament or boiling point, I think that most of us would say that temperament and boiling point are not the same. They are not the same to me. My temperament is something that a jury should take into consideration in determining whether I acted with premeditation and deliberation, whether I acted in the heat of passion, whether I acted reasonable, whether I had a perfect or an imperfect self-defense. Let me put it that way.

"And temperament, my temperament, would have a bearing on each one of those issues, I would think, in terms of my boiling point, that quite frankly, comes in at a different way.

"I could deliberate and premeditate and be guilty of first degree murder because, in fact, I had reached my boiling point. And when I reached my boiling point, that's when I made my decision to shoot another human being.

"Boiling point also comes up under heat of passion. Boiling point maybe comes up under the imperfect self-defense and I suppose probably with a deeper analysis, it may or may not come up with regard to a voluntary. And I really haven't given a whole lot of consideration to second, although my real quick thoughts are that it doesn't really come up with regard to second.

"While it does, too. It comes up in 8.31. If I reach my boiling point, I then could be said to have a conscious disregard for human life. It also comes up to a certain extent in the perfect self-defense instructions.

"So what I've got here is something that I don't think I can answer and I'm not certain that it would stand up no matter how I answered it."

After a short recess, the following took place:

"[THE COURT:] Counsel, I've taken another look at 8.20 and I think it answers the note that they have sent out. There is a little part of me that says these folks may very well be deadlocked on the facts and not on the evidence....

"........................................................................................

"MR TAUZER: Well, if we are going to answer this at all, I did note that this instruction itself says as far as time goes, the time will vary with different individuals and under varying circumstances.

"What I had written was for purposes of CALJIC 8.20, the determination of whether or not the defendant acted with premeditation and deliberation is a determination which you shall make based upon all of the proved facts and circumstances. The court cannot advise you what weight, if any, to give to such factors as the defendant's temperament or the defendant's boiling point. The question for you to decide is whether or not the defendant acted with deliberation and premeditation. The answer to this question will vary with different individuals and under varying circumstances.

"THE COURT: Thank you. Mrs. Huffman?

"MRS. HUFFMAN: I don't think 8.20 could be redefined.

"THE COURT: Appreciating what has been suggested, I'm going to bring the jury back in and to tell them that we will not give them a further definition of first degree murder. I'm going to send them back in after that to see what happens. Let's bring in the jury.

"MRS. HUFFMAN: I would like the record to reflect that I'm objecting to sending them back in.

"THE COURT: Noted.

"Ladies and gentlemen of the jury, counsel and I have discussed the note that you have sent out.

"Trusting or hoping that you will accept my ruling and my answer, my response is that I am not going to respond to it other than to tell you that the definition of first degree murder is contained in CALJIC 8.20, Pages 45 and 46 of the instructions and it will not be defined further.

"..................................................................................

'I would invite you to reread that instruction just from beginning to end and then take it from there. Okay? Thank you ....

"The record will reflect that the jurors have left.

"Counsel, the reason I hesitated was because it was on the tip of my lips to say something more, but I had not covered it with you and as I thought about saying it, it was something that I truly believe will be fair and would be helpful to the jury and yet might be misconstrued by one party or the other. And that was to suggest to the jurors that they reread in their entirety the instructions dealing with first and second degree murder, voluntary manslaughter, involuntary manslaughter, and self-defense.

"The reason I was tempted to do that, of course, was for the reasons that I've stated earlier in terms of a number of the words they have used in these notes as potentially pertaining to some of those concepts.

"Mr. Tauzer, you don't want me to bring them back in and do that, do you?

"MR. TAUZER: No, I don't because they seem to be focused on 8.20 and I don't think they need to read all those instructions all over again.

"THE COURT: Mrs. Huffman, you don't want me to do that either, do you?

"MRS. HUFFMAN: I would have no objection.

"THE COURT: I could think—you are smiling as you are sitting there saying that and I accept that personally. I'll just respond by saying I can think of at least two good reasons why I would not do that were I in your shoes and I'm glad I'm not in your shoes. But I don't want you to think that I'm not taking you up on your suggestion or your comment lightly or irreverently."

The jury resumed its deliberations that afternoon, and again the next morning (Mar. 3). On March 3, they reconvened at 1:30 p.m. following lunch; shortly after, they returned a verdict of first degree murder on count 1.

## B. Analysis

"[T]he trial court bears the responsibility of instructing the jury on all the general principles of law raised by the evidence which are necessary for the jury's proper understanding of the case. [Citation.] Moreover, '[a]fter the jury have retired for deliberation, ... if they desire to be informed on any point of law arising in the case, ... the information required must be given ....' [Citations.]" (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022; see Pen. Code, § 1138.)[89]

> "The court has a primary duty to help the jury understand the legal principles it is asked to apply. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250-251.) This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213.) Indeed, comments diverging from the standard are often risky. (E.g., *People v. Lee* (1979) 92 Cal.App.3d 707, 716.) The trial court was understandably reluctant to

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[89] Penal Code section 1138 states in part: "After the jury have retired for deliberation, ... if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given ...."

> strike out on its own. But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, parallel citations omitted.)

The trial court in *Beardslee* did not do so, telling the jury instead, in response to a request for an explanation of an instruction, that none of the instructions would be explained. (*People v. Beardslee, supra,* 53 Cal.3d at p. 96.) In the present case, by contrast, the trial court clearly examined each question from the jury, consulted with counsel, explored possible responses, and determined that referring the jury back first to the instructions as a whole, then to CALJIC No. 8.20, was the best course of action. As the original instructions were themselves full and complete, the trial court had discretion to determine what, if any, additional explanations were sufficient to satisfy the jury's requests. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1213.) It did not abuse that discretion. (See *id.* at pp. 1212-1213; *People v. Moore* (1996) 44 Cal.App.4th 1323, 1330-1331; *People v. Hill* (1992) 3 Cal.App.4th 16, 25 [disapproved on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5]; *People v. Guilmette (1991)* 1 Cal.App.4th 1534, 1542.)

Moreover, "'[a]pproval of the court's action, even though it might have been a technical violation of section 1138 of the Penal Code, cures any possible error.

[Citation.]"' (*People v. Kageler* (1973) 32 Cal.App.3d 738, 746.) Here, defense counsel clearly approved of the trial court's action.[90] Despite her correct statement that deliberation and premeditation are not based on a reasonable person standard (see, e.g., *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295 [whether provocation precluded defendant from premeditating requires determination of defendant's subjective state]), counsel stated, in response to an attempt by the prosecutor to draft an explanatory instruction, that she did not think CALJIC No. 8.20 could be redefined. The trial court answered the jury accordingly. Defense counsel's approval of the trial court's response to the jury's question bars a contention that the trial court should have clarified or elaborated further. (*People v. Beardslee, supra* 53 Cal.3d at p. 117.)

To summarize, we find no error in the trial court's responding to the jury as it did. Assuming error occurred, however, appellant cannot complain about it on appeal.

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[90] Although defense counsel stated that she would have no objection to the trial court telling jurors to reread all the instructions dealing with first and second degree murder, voluntary and involuntary manslaughter, and self-defense, the trial court did, at one point, remind jurors that they were to consider the instructions as a whole and each in light of the others.

## IX.

## Cumulative Error

Last, appellant contends that he was denied due process of law by the cumulative effect of the errors that occurred during his trial. We have examined appellant's claims of error and have rejected nearly all of them. When we have found error, we have concluded appellant was not prejudiced. Appellant "'has merely shown that his "'trial was not perfect—few are."" [Citation.]" *(People v. Bradford* (1997) 14 Cal.4th 1005, 1057.) We therefore reject his claim of cumulative error.

The judgment is affirmed.

/s/
Arduiz, P.S.

WE CONCUR:

/s/
Vartabedian, J.

/s/
Harris, J.

# APPENDIX B

Fifth Appellate District No. FO23776
SO78069
IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
**FILED**
JUN 16 1999
Robert Wandruff Clerk

Deputy

---

THE PEOPLE, Respondent

v.

BRUCE LYNN SONS, Appellant

---

Appellant's motion for leave to file petition under seal granted.
Petition for review DENIED.

Kennard, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice

# APPENDIX C
[Redacted]

# APPENDIX D

## Reporter's Transcript Pages 229 - 230

* * * *

THE COURT: So if I were to give you that little part, I would then have to give Mr. Tauzer the rest of it.

I don't know, first of all, that it would actually be relevant, that it would actually be admissible, so I don't even know that you would get your things that would be helpful to you in there, but if you did, believe me, you would not want to see the rest of it. It would not be of any benefit to Mr. Sons whatsoever. So I made that determination with regard to the bulk of the rest of it.

And I suspect that the attorney general is not going to seek a writ, but can. Ten days from today or so, you should be getting, each of you, copies of what I think may be of some assistance to you.

Again, I want to make sure we call all understand that my approach with regard to discovery of those materials was not to make a ruling with regard to relevancy.

I leave that to the three of you or two of you to argue at an appropriate time.

What I looked at was to see could it be relevant, might it be relevant, could it lead to discoverable admissible evidence. And if so, then I had to balance the privilege or the need to keep it restricted by the California Highway Patrol.

What I am going to give you, you folks can argue later about the relevancy. As to the rest of it, as I say, there were certain things that the privilege obviously outweighed anything that might be of any benefit to you.

And also, I took a look at it and made that other determination, and it was not really a factor, a major factor in my decision, but it was something that I did consider.

And you and I, Mrs. Huffman, and Mr. Childers and Mr. Tauzer for that matter, have known each other for a lot of years, and you know I have presided over trials for 13 years. I feel more comfortable up here than down there trying a case, certainly, but sitting up here, after awhile, you get a pretty good feel for how a jury might react to certain things. And believe me, overall, I feel comfortable suggesting that if you are short on time, Mrs. Huffman, you may or may not want to think twice before you spend a lot of time going up on that particular issue on a writ.

Okay. I probably said more than I should, but again, out of fairness to both sides, I thought I ought to mention it.

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## Reporter's Transcripts Pages 5540 - 5541

(Cross Examination of Sergeant James Young)

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Q. Okay.

Now, I understand that you are familiar with the shooting report, is that correct?

A. Yes, ma'am.

Q. and you have been given a copy of that this morning to look at; is that right?

A. Yes, ma'am, just a copy of the investigative summary.

Q. Okay.

And the investigative summary starts out with part 3, does it not?

A. Yes, ma'am, it does.

Q. And it has no delineation of what department that came from, does it?

A. No, it does not.

Q. Officer, would it be fair to say that the copy of the documents consists of 11 pages, and appears to be part of a report that the, by the Highway Patrol, concerning a shoot out situation where Officer Maxwell lost his life?

A. Yes, ma'am, that is correct.

Q. Have you had an opportunity to review this?

A. I have not read it verbatim, but I have reviewed it in the past, yes, ma'am.

Q. Have you reviewed it since you were given it this morning?

A. I looked at it briefly. I did not read every word.

Q. Did you participate in the formulation of this report?

A. I did not, no ma'am, I did not.

Q. There is no original first page on this document. Who was it originally directed to, if you know?

A. This was a departmental investigation and administrative investigation as to the discharge of a firearm by Officer Maxwell, and as I understand it, the central division of the California Highway Patrol, the officer involved shooting investigative team complied the information and prepared this report.

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